Supreme Court, U.S.
FILED

114 (1) 08-759 DEC 10 2008

No. OFFICE OF THE CLERK

In the Supreme Court of the United States

SPRINT TELEPHONY PCS, L.P., PETITIONER

v.

COUNTY OF SAN DIEGO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DANIEL T. PASCUCCI
NATHAN R. HAMLER
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.
3580 Carmel Mountain Road, Suite 300
San Diego, CA 92130
(858) 314-1500

KANNON K. SHANMUGAM
Counsel of Record
THOMAS J. ROBERTS
SARAH F. TEICH
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000

QUESTION PRESENTED

Section 253(a) of the Communications Act of 1934 (as added by the Telecommunications Act of 1996), 47 U.S.C. 253(a), provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." The question presented is as follows:

Whether a state or local regulation that does not expressly prohibit the provision of telecommunications service is nevertheless preempted by 47 U.S.C. 253(a) if it substantially impedes an entity from providing service.

PARTIES TO THE PROCEEDING

Petitioner is Sprint Telephony PCS, L.P., a wholly owned subsidiary of Sprint Nextel Corporation. Respondents are the County of San Diego and Greg Cox, Dianne Jacob, Bill Horn, Ron Roberts, and Pam Slater-Price, Members of the Board of Supervisors of the County of San Diego.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 2
Statutory provisions involved 2
Statement 2
Reasons for granting the petition 12
A. The decision below conflicts with the decisions of several other courts of appeals 12
B. The court of appeals' interpretation of Section 253(a) is erroneous 17
C. The question presented is an important one that is ripe for this Court's review 21
D. This case is an ideal vehicle for considering the question presented 24
Conclusion 30
Appendix A 1a
Appendix B 18a
Appendix C 54a
Appendix D 90a
Appendix E 92a

TABLE OF AUTHORITIES

Cases:

AT&T Corp. v. *Iowa Utilities Board*, 525 U.S. 366 (1999) 3
Cablevision of Boston, Inc. v. *Public Improvement Commission*, 184 F.3d 88 (1st Cir. 1999) 3
In re California Payphone Association, 12 F.C.C.R. 14 (1997) 10, 13, 14, 15, 20
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) 20

Page

Cases—continued:

In re Cheyenne River Sioux Tribe Telephone Auth., 17 F.C.C.R. 16,916 (2002) 20
City of Abilene v. *FCC*, 164 F.3d 49 (D.C. Cir. 1999) 17
City of Auburn v. *Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), cert. denied, 534 U.S. 1079 (2002) 9, 16, 19, 24, 25
City of Rancho Palos Verdes v. *Abrams*, 544 U.S. 113 (2005) 22
Level 3 Communications, L.L.C. v. *City of St. Louis*, 477 F.3d 528 (8th Cir. 2007) ..... *passim*
Level 3 Communications, L.L.C. v. *City of St. Louis*, 405 F. Supp. 2d 1047 (E.D. Mo. 2005) 28
In re Low Tech Designs, Inc., 13 F.C.C.R. 1755 (1997) 20
New Jersey Payphone Association v. *Town of West New York*, 299 F.3d 235 (3d Cir. 2002) 17
New York SMSA Ltd. P'ship v. *Town of Clarkstown*, No. 7:07-cv-07637-CS (S.D.N.Y. filed Aug. 28, 2007) 22
Newpath Networks, L.L.C. v. *City of Irvine*, Nos. 08-55755 & 08-56010 (9th Cir. appeal filed May 2, 2008) 22
NextG Networks of Cal., Inc. v. *City of Huntington Beach*, No. 8:07-cv-01471 (C.D. Cal. filed Dec. 27, 2007) 22
Nixon v. *Missouri Municipal League*, 541 U.S. 125 (2004) 18, 22
In re Pittencrieff Communications, Inc., 13 F.C.C.R. 1735 (1997) 20
In re Public Utility Commission, 13 F.C.C.R. 3460 (1997) 4, 20
Puerto Rico Telephone Co. v. *Municipality of Guayanilla*, 450 F.3d 9 (1st Cir. 2006) 10, 13, 19, 20
Qwest Communications, Inc. v. *City of Berkeley*, 433 F.3d 1253 (9th Cir. 2006) 24

Page

Cases—continued:

Qwest Corp. v. *City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004) ..... *passim*
TCG Detroit v. *City of Dearborn*, 206 F.3d 618 (6th Cir. 2000) 27
TCG New York, Inc. v. *City of White Plains*, 305 F.3d 67 (2d Cir. 2002), cert. denied, 538 U.S. 923 (2003) ..... *passim*
In re TCI Cablevision of Oakland County, Inc., 12 F.C.C.R. 21 (1997) 3, 20
United States v. *Salerno*, 481 U.S. 739 (1987) 11, 20, 21
Verizon Communications, Inc. v. *FCC*, 535 U.S. 467 (2002) 18

Statutes and ordinances:

Telecommunications Act of 1996, Pub. L. No. 104-104, Preamble, 110 Stat. 56 3
28 U.S.C. 1254(1) 2
42 U.S.C. 1983 ..... 7, 22
47 U.S.C. 253(a) ..... *passim*
47 U.S.C. 253(c) 7, 8, 27, 28
47 U.S.C. 332(c)(7) 22, 25, 26
San Diego County Zoning Ordinance:
§ 6982 4
§ 6984 ..... 4, 5, 6, 24
§ 6985 ..... 5, 6, 24
§ 6986 5
§ 6987 5
§§ 6989-6991 2
§ 7354 6
§ 7356 6
§ 7358 6
§ 7362 6
§ 7382 6
§ 7703 6

Page

Miscellaneous:

Steven J. Eagle, *Wireless Telecommunications, Infrastructure Security, and the NIMBY Problem*, 54 Cath. U. L. Rev. 445 (2005) 29

FCC, Twelfth Annual Report on the State of Competitive Market Conditions With Respect to the Wireless Industry, Report No. 08-28 (2008) <http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-28A1.pdf> 29

H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. (1996) 3

H.R. Rep. No. 204, 104th Cong., 1st Sess. (1995) 3, 23

Memorandum from Wendy Cosins, Deputy Planning Director, to Members of the Berkeley Planning Commission (Nov. 5, 2008) <http://www.tinyurl.com/berkeleymemo> 23, 24

Malcolm J. Tuesley, Note, *Not in My Backyard: The Siting of Wireless Communications Facilities*, 51 Fed. Comm. L.J. 887 (1999) 29

S. Rep. No. 23, 104th Cong., 1st Sess. (1995) 4

U.S. Census Bureau, 100 Largest U.S. Counties (July 1, 2007) <http://www.census.gov/popest/counties/CO-EST2007-07.html> 4

In the Supreme Court of the United States

No.

SPRINT TELEPHONY PCS, L.P., PETITIONER

v.

COUNTY OF SAN DIEGO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Sprint Telephony PCS, L.P., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals (App., *infra*, 1a-17a) is reported at 543 F.3d 571. The opinion of the court of appeals panel (App., *infra*, 18a-53a), as amended, is reported at 490 F.3d 700. The district court's order granting summary judgment to petitioner and denying summary judgment to respondents in relevant part (App., *infra*, 54a-89a) is reported at 377 F. Supp. 2d 886.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 253 of the Communications Act of 1934 (as added by the Telecommunications Act of 1996), 47 U.S.C. 253, and the San Diego County Ordinance Amending the Zoning Ordinance Relating to Wireless Telecommunications Facilities (Wireless Ordinance), Ord. No. 9549 (2003) (codified at Zoning Ord. §§ 6980-6991), are reproduced in the appendix to this petition (App., *infra*, 92a-115a).

STATEMENT

Petitioner brought suit against respondents in the United States District Court for the Southern District of California, claiming, *inter alia*, that the San Diego County Wireless Ordinance was preempted by Section 253(a) of the Communications Act of 1934 (as added by the Telecommunications Act of 1996). The district court granted summary judgment to petitioner and denied summary judgment to respondents on that claim. App., *infra*, 54a-89a. A panel of the court of appeals affirmed. *Id.* at 18a-53a. After granting rehearing en banc, however, the court of appeals reversed, holding that the Wireless Ordinance was not preempted. *Id.* at 1a-17a. In doing so, the court of appeals expressly recognized that its interpretation of Section 253(a) conflicted with those of several other circuits. See *id.* at 9a-10a.

1. a. Congress enacted the Telecommunications Act of 1996 to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and en-

courage the rapid deployment of new telecommunications technologies." Telecommunications Act of 1996, Pub. L. No. 104-104, Preamble, 110 Stat. 56. The Telecommunications Act was intended to "end[] the long-standing regime of state-sanctioned monopolies" in the provision of telephone service, *AT&T Corp.* v. *Iowa Utilities Bd.*, 525 U.S. 366, 371 (1999), and to "accelerate rapidly private sector deployment of advanced telecommunications [services] to all Americans by opening all telecommunications markets to competition," H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 113 (1996).

Although the wireless communications industry was still in its relative infancy, Congress expressed particular concern about the need to remove barriers to competition in that industry. Specifically, the House Commerce Committee found that state and local zoning decisions concerning the placement of wireless facilities were "creat[ing] an inconsistent and, at times, conflicting patchwork of requirements" that was threatening to "inhibit the deployment" of wireless services. H.R. Rep. No. 204, 104th Cong., 1st Sess. 94 (1995).

In significant respects, the Telecommunications Act shifted the locus of regulatory authority over the telecommunications industry from the state and local level to the federal level. One of the Telecommunication Act's "central" provisions in this regard was its preemption provision, new Section 253 of the Communications Act of 1934, 47 U.S.C. 253. See *Cablevision of Boston, Inc.* v. *Public Improvement Comm'n*, 184 F.3d 88, 97 (1st Cir. 1999); see also *In re TCI Cablevision of Oakland County, Inc.*, 12 F.C.C.R. 21,396, 21,440 (¶ 102) (1997) (noting that Section 253 was a "critical component of Congress' pro-competitive deregulatory national policy framework"). The subsection of that provision at issue here, Section 253(a), provides that "[n]o State or local

statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. 253(a). Section 253(a) was intended to "preempt[] almost all State and local barriers to competing with the telephone companies," S. Rep. No. 23, 104th Cong., 1st Sess. 5 (1995), and to ensure that federal telecommunications policy "would indeed be the law of the land and could not be frustrated by the isolated actions of individual municipal authorities or states," *In re Public Utility Comm'n*, 13 F.C.C.R. 3460, 3463 (¶ 4) (1997), petition for review denied, 164 F.3d 49 (D.C. Cir. 1999).

b. San Diego County, California, is the sixth largest county in the United States, with a population of nearly 3 million. See U.S. Census Bureau, 100 Largest U.S. Counties (July 1, 2007) <http://www.census.gov/popest/counties/CO-EST2007-07.html>. On April 30, 2003, the County's Board of Supervisors adopted the Wireless Ordinance. The stated purpose of that ordinance was to "provide a uniform and comprehensive set of standards for the development, siting and installation of wireless telecommunications facilities" in San Diego County. Zoning Ord. § 6982.

The Wireless Ordinance establishes a host of substantive and procedural requirements for the placement and design of wireless facilities, above and beyond the generally applicable requirements contained in preexisting provisions of the county's zoning ordinance. As a substantive matter, the Wireless Ordinance requires a provider to show that a proposed wireless facility is "necessary" to close a "gap" in the provider's service network. Zoning Ord. § 6984(a). The proposed facility, moreover, must be located in a "preferred zone" (*e.g.*, in certain listed areas) and at a "preferred location" within

that zone (*e.g.*, on an existing structure or a commercial or industrial building), unless the provider can show that such a location would not be "technologically or legally feasible." *Id.* § 6986(a)-(b). In addition, a proposed wireless facility must "be designed to minimize the visual impact to the greatest extent feasible * * * and to be compatible with existing architectural elements * * * and other site characteristics," *id.* § 6987(f); the facility must be "the minimum height required from a technological standpoint for the proposed site," *id.* § 6984(c)(1); and the facility must meet a number of other highly detailed design requirements (right down to the use of "non-reflective" colors and "graffiti-resistant coating[s]"), *id.* § 6986(a)-(e), (g)-(r).

Where the proposed facility will be located in a residential area, any tower in the facility must be set back from the nearest lot by a distance of at least 50 feet, Zoning Ord. § 6985(c)(4), and certain types of towers may not be used, *id.* § 6985(c)(1). No matter where the facility is located, moreover, the provider must agree to share the facility with other providers, as long as it would be feasible and "aesthetically desirable" to do so. *Id.* § 6984(c)(9). And even if the proposed facility is in compliance with applicable requirements established by the Federal Communications Commission (FCC), the County may deny permission if the facility would interfere with its regional communications system. *Id.* § 6984(c)(11).

As a procedural matter, the Wireless Ordinance establishes four tiers of review for applications for wireless facilities, depending on the type of the facility and its location. Zoning Ord. § 6985(a). Lower-tier applications are subject to review by the Director of the Planning and Land Use Department (with or without community input); higher-tier applications require use permits and

may be reviewed directly by the Planning Commission. *Id.* § 6985(a)-(b). Regardless of the tier to which an application is assigned, however, a provider must comply with detailed application requirements. For example, the provider must submit a map showing "the gap [that] the facility is meant to close"; a "visual impact analysis," including photo simulations, the proposed color scheme, and a site map; and a detailed narrative with information about, *inter alia*, the facility's height, landscaping, maintenance, and noise levels. *Id.* § 6984(a)-(c). And the Director of the Planning and Land Use Department retains the discretion, "based upon specific project factors," to require the provider to submit additional information. *Id.* § 6984.

A provider seeking to build a wireless facility in San Diego County must also satisfy the generally applicable requirements contained in preexisting provisions of the county's zoning ordinance. Where a use permit is required—*i.e.*, for most "high-visibility" facilities or facilities located in residential or rural areas—the provider must submit still more information (such as an assessment of the environmental impact of the facility), Zoning Ord. § 7354(b), and the application must be considered at a public hearing, *id.* § 7356. Critically, the County retains the unfettered discretion to grant or deny the application based on "[a]ny * * * relevant impact of the proposed use." *Id.* § 7358(a)(6). If it grants the application, the County may impose any conditions on the use that are "reasonable and necessary or advisable under the circumstances," *id.* § 7362, and may revoke or modify the permit at any time, *id.* § 7382. A provider that fails to comply with any provision of the zoning ordinance is subject to criminal and civil penalties. *Id.* § 7703.

2. Petitioner is one of the Nation's largest providers of wireless telecommunications services (including mo-

bile telephone service). On July 15, 2003, petitioner, filed suit against respondents, the County of San Diego and the members of its Board of Supervisors, in the United States District Court for the Southern District of California.[1] Petitioner claimed, *inter alia*, that the San Diego County Wireless Ordinance was preempted by 47 U.S.C. 253(a).[2]

After the parties cross-moved for summary judgment on petitioner's Section 253(a) claim, the district court granted summary judgment to petitioner (and denied summary judgment to respondents) on that claim. App., *infra*, 54a-89a. As is relevant here, the district court held that the Wireless Ordinance was preempted by Section 253(a). *Id.* at 65a-74a.

The district court reasoned that the relevant inquiry under Section 253(a) was "whether the regulatory scheme established by the [Wireless Ordinance] prohibits or has the effect of prohibiting [petitioner] from providing wireless telecommunications service." App., *infra*, 65a. The district court noted that "[c]ourts applying

---

[1] Another wireless provider, Pacific Bell Wireless (now a subsidiary of AT&T), joined in the complaint and subsequently settled.

[2] Petitioner also claimed that the Wireless Ordinance discriminated against some providers using public rights-of-way, in violation of 47 U.S.C. 253(c), and that plaintiffs were entitled to damages for the alleged violations of Section 253 pursuant to 42 U.S.C. 1983. See C.A. E.R. 11-12. The district court dismissed the Section 253(c) claim on the ground that Section 253(c) "does not provide an independent cause of action." *Id.* at 23. Petitioner abandoned that claim on appeal. As for the Section 1983 claim, the district court granted summary judgment to respondents on that claim on the ground that "section 253(a) does not give rise to a private right enforceable through [Section] 1983," App., *infra*, 81a, and the en banc court of appeals agreed that "[Section] 1983 claims cannot be brought for violations of [Section] 253," *id.* at 16a. Petitioner does not challenge that holding of the court of appeals in this petition.

section 253(a) have found that certain features of regulations, in combination, have the effect of prohibiting the provision of telecommunications services." *Id.* at 65a-66a. Those features, the court continued, "include * * * numerous submission or disclosure requirements, retention of discretion by the city to require further disclosures, public hearing requirements, unlimited discretion of the city to grant or deny permits, and civil and/or criminal penalties." *Id.* at 66a (citing cases). The court then determined that, "[l]ike the ordinances and regulations in the cases [cited], the [Wireless Ordinance] includes a number of features that have the collective effect of prohibiting the provision of telecommunications service." *Id.* at 70a. The court explained that the Wireless Ordinance "impose[s] burdensome submission requirements"; "unreasonabl[y]" requires providers to be willing to share their facilities, regardless of the terms; and "allow[s] for the exercise of unfettered discretion at every level of the application process." *Id.* at 70a-71a.[3]

3. A panel of the court of appeals affirmed. App., *infra*, 18a-52a. With regard to whether the Wireless Ordinance was preempted by Section 253(a), the panel stated that this case raised "almost identical" concerns to those

---

[3] The district court also held that the Wireless Ordinance was not saved by 47 U.S.C. 253(c), which preserves the authority of a state or local government "to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers * * * for use of public rights-of-way on a non-discriminatory basis." App., *infra*, 74a-78a. The court reasoned that "Section 253(c) clearly does not apply to the extent that the [Wireless Ordinance] goes beyond regulating the public rights-of-way," *id.* at 75a, and that, even if the Wireless Ordinance could be interpreted to apply only to public rights-of-way, "many of its requirements would not qualify as management of the public rights-of-way," *id.* at 76a (internal quotation marks omitted). Respondents did not contend on appeal that the Wireless Ordinance was saved by Section 253(c).

raised in *City of Auburn* v. *Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), cert. denied, 534 U.S. 1079 (2002), in which the court had held that similar ordinances were preempted. App., *infra*, 48a. The panel explained that "[t]he [Wireless Ordinance], on its face, supplements the Zoning Ordinance by adding submission requirements to an already voluminous list." *Ibid.* "Those requirements," the panel continued, "are in addition to the open-ended discretion and threat of criminal penalties contained in the Zoning Ordinance." *Ibid.* The panel added that "[t]he [Wireless Ordinance] itself explicitly allows the decision maker to determine whether a facility is appropriately 'camouflaged,' 'consistent with community character,' and designed to have minimum 'visual impact.'" *Ibid.* (citations omitted). The panel therefore concluded that "the [Wireless Ordinance] imposes a permitting structure and design requirements that present[] barriers to wireless telecommunications within the County, and is therefore preempted by § 253(a)." *Ibid.*

4. After granting rehearing en banc, the court of appeals reversed, holding that the Wireless Ordinance was not preempted. App., *infra*, 1a-17a.

As is relevant here, the en banc court of appeals first noted that the panel in *City of Auburn* had "adopted [a] broad interpretation of [the] preemptive effect" of Section 253(a). App., *infra*, 8a. The court reasoned that, by erroneously relying on the use of the word "may" in that provision, the *City of Auburn* court had held that, "if a local regulation merely 'create[s] a substantial . . . barrier' to the provision of services or 'allows a city to bar' provision of services,' then Section 253(a) preempts the regulation." *Id.* at 8a-9a (quoting *City of Auburn*, 260 F.3d at 1176)).

The court of appeals then contended that "[*City of Auburn*'s] expansive reading of the preemptive effect of

§ 253(a) has had far-reaching consequences." App., *infra*, 9a. The court noted that "[t]hree of our sister circuits * * * have followed our broad interpretation of § 253(a), albeit with little discussion." *Ibid.* (citing *Puerto Rico Telephone Co.* v. *Municipality of Guayanilla*, 450 F.3d 9 (1st Cir. 2006); *TCG New York, Inc.* v. *City of White Plains*, 305 F.3d 67 (2d Cir. 2002), cert. denied, 538 U.S. 923 (2003); and *Qwest Corp.* v. *City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004)). The court also noted that, "[a]pplying our [*City of*] *Auburn* standard, federal district courts have invalidated local regulations in tens of cases across this nation's towns and cities." *Ibid.* (citing cases).

On the other hand, the court of appeals explained, the Eighth Circuit had "rejected the [*City of*] *Auburn* standard." App., *infra*, 10a (citing *Level 3 Communications, L.L.C.* v. *City of St. Louis*, 477 F.3d 528 (8th Cir. 2007), petition for cert. pending, No. 08-626 (filed Nov. 7, 2008)). The court concluded that the Eighth Circuit's critique of *City of Auburn* was "persuasive," reasoning that "Congress' use of the word 'may' * * * convey[s] the meaning that 'state and local regulations *shall not* prohibit or have the effect of prohibiting telecommunications services." *Ibid.* (emphasis added). The court also asserted that a "narrow" interpretation of Section 253(a) was "consistent with the FCC's." *Id.* at 11a (citing *In re California Payphone Association*, 12 F.C.C.R. 14,191 (1997)).

The court of appeals therefore overruled its earlier decision in *City of Auburn* and agreed with the Eighth Circuit that, in order to establish preemption, "a plaintiff * * * must show actual or effective prohibition, rather than the mere possibility of prohibition." App., *infra*, at 10a-11a (internal quotation marks and citation omitted). By contrast, under the court's standard, "a plaintiff's

showing that a locality could *potentially* prohibit the provision of telecommunications services is insufficient." *Id.* at 13a. The court further noted that, because petitioner's claim constituted a "facial challenge to the [Wireless] Ordinance," it was subject to the rule of *United States* v. *Salerno*, 481 U.S. 739 (1987), under which a claimant must show that "no set of circumstances exists under which the [challenged statute] would be valid." App., *infra*, 13a-14a.

Turning to the application of its standard, the court of appeals reasoned, with regard to the Wireless Ordinance's unfettered discretion, that "[i]t is certainly true that a zoning board *could* exercise its discretion to effectively prohibit the provision of wireless services, but it is equally true (and more likely) that a zoning board would exercise its discretion only to balance the competing goals of [the] ordinance." App., *infra*, 15a. Regarding the Wireless Ordinance's procedural requirements, the court similarly reasoned that, "[a]lthough a zoning board could conceivably use these procedural requirements to stall applications and thus effectively prohibit the provision of wireless services, the zoning board equally could use these tools to evaluate fully and promptly the merits of an application." *Ibid.* And regarding the Wireless Ordinance's substantive requirements, the court asserted that "[petitioner] has not identified a single requirement that effectively prohibits it from providing wireless services." *Id.* at 15a-16a.

The court of appeals suggested that a facial challenge could succeed if an ordinance "effect[ed] a significant gap in service coverage": for example, "[i]f an ordinance required * * * that all [wireless] facilities be underground" or "that no wireless facilities be located within one mile of a road." App., *infra*, 16a. Absent such a showing, however, the court concluded that "the [Wire-

less] Ordinance does not effectively prohibit [petitioner] from providing wireless services." *Ibid.*[4]

REASONS FOR GRANTING THE PETITION

The en banc Ninth Circuit held in this case that a state or local regulation that does not expressly prohibit the provision of telecommunications service is preempted by 47 U.S.C. 253(a) only if it effects a complete ban on the provision of service. In so holding, the court of appeals expressly recognized that its interpretation of Section 253(a) conflicted with those of several other circuits. The court of appeals' analysis was deeply flawed, and the resulting rule promises to have substantial and harmful consequences for the telecommunications industry in general and the wireless industry in particular. This case, moreover, is an excellent vehicle for resolution of the circuit conflict concerning the interpretation of Section 253(a). In short, this case satisfies all of the Court's traditional criteria for granting review.

A. The Decision Below Conflicts With The Decisions Of Several Other Courts Of Appeals

In the decision below, the en banc Ninth Circuit held that a state or local regulation that does not expressly prohibit the provision of telecommunications service is preempted by 47 U.S.C. 253(a) only if it effects a complete ban on the provision of service. App., *infra*, 16a. As the court expressly recognized, its "narrow" interpretation of Section 253(a) conflicts with the interpretations

---

[4] Judge Gould concurred. App., *infra*, 17a. He reasoned that zoning ordinances could be preempted if "they would substantially interfere with the ability of the carrier to provide [telecommunications] services," but concluded, without elaboration, that "the record in this case shows that the telecommunications services here were not effectively barred by the zoning ordinance." *Ibid.*

of several other circuits. See *id.* at 9a, 11a. That clear and substantial circuit conflict warrants this Court's review.

1. Although they have used slightly different formulations of the applicable standard, three circuits—the First, Second, and Tenth—have held that a state or local regulation is preempted by 47 U.S.C. 253(a) if it substantially impedes an entity from providing telecommunications service.

In *Puerto Rico Telephone Co.* v. *Municipality of Guayanilla*, 450 F.3d 9 (2006), the First Circuit held that, for purposes of determining whether a regulation "ha[s] the effect of prohibiting the ability of any entity to provide any * * * telecommunications service," the relevant inquiry is whether "the [regulation] materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *Id.* at 18 (citing, *inter alia*, *In re California Payphone Association*, 12 F.C.C.R. 14,191, 14,206 (¶ 31) (1997)). The court added that "a prohibition does not need to be complete or 'insurmountable' to run afoul of § 253(a)." *Ibid.* (citation omitted). Applying that standard, the court invalidated a local ordinance that imposed a 5% fee on gross revenues from all telephone calls originating within the locality (and required providers to comply with associated reporting requirements). *Id.* at 11-12, 23-24. The court reasoned that the ordinance would "negatively affect [the challenging provider's] profitability"; give rise to "a substantial increase in [the provider's] costs"; and "place a significant burden" on the provider. *Id.* at 18, 19.

Similarly, in *TCG New York, Inc.* v. *City of White Plains*, 305 F.3d 67 (2002), cert. denied, 538 U.S. 923 (2003), the Second Circuit held that the test under Section 253(a) is whether a regulation "materially inhibits or

limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *Id.* at 76 (quoting *California Payphone Association*, 12 F.C.C.R. at 14,206 (¶ 31)). Like the First Circuit, the Second Circuit noted that "a prohibition does not need to be complete or 'insurmountable' to run afoul of § 253(a))." *Ibid.* (citation omitted). The court proceeded to invalidate a local ordinance that subjected non-incumbent providers to a host of substantive and procedural requirements (and pursuant to which the locality sought to impose a 5% gross-revenues fee on the challenging provider). *Id.* at 71-73, 82. Notably, in invalidating the ordinance, the court focused on a provision that gave the local council the unfettered discretion to reject any application for a franchise. *Id.* at 76. The court concluded that the ordinance was preempted because it would pose "obstacles * * * to [the challenging provider's] ability to compete in [the locality] on a fair basis." *Id.* at 76-77.

For its part, in *Qwest Corp.* v. *City of Santa Fe*, 380 F.3d 1258 (2004), the Tenth Circuit held that the relevant inquiry under Section 253(a) is whether a regulation "would 'materially inhibit' the provision of [telecommunications] services." *Id.* at 1271 (quoting *California Payphone Association*, 12 F.C.C.R. at 14,206 (¶ 31)). The court also observed that "an absolute bar on the provision of services is not required." *Ibid.* Applying that standard, the court invalidated a local ordinance that required providers to register with the locality and obtain lease agreements before using public rights-of-way. *Id.* at 1262-1263, 1275. Like the Second Circuit, the Tenth Circuit focused on the fact that the ordinance contained a provision giving the locality "broad discretion in determining whether or not to accept a registration or lease application." *Id.* at 1270. The court reasoned that the

provision would "den[y] telecommunications providers the fair and balanced legal and regulatory environment the [Telecommunications Act] was designed to create" and that other provisions would "create a significant burden" and impose "substantial costs" on the challenging provider. *Id.* at 1270, 1271 (internal quotation marks and citation omitted).

2. The Eighth Circuit, by contrast, has expressly repudiated the approaches of the First, Second, and Tenth Circuits. In *Level 3 Communications, L.L.C.* v. *City of St. Louis*, 477 F.3d 528 (2007), petition for cert. pending, No. 08-626 (filed Nov. 7, 2008), the Eighth Circuit contended that those circuits had "reach[ed] a conclusion contrary to a complete analysis of [Section 253(a)]." *Id.* at 533. The court reasoned that Section 253(a) could not be read to "result[] in a preemption of regulations which might, or may at some point in the future, actually or effectively prohibit services." *Ibid.* The court therefore concluded that it was insufficient for a provider challenging a regulation under Section 253(a) to show "the mere possibility of prohibition." *Ibid.*

Confusingly, however, the Eighth Circuit—like the circuits whose approaches it purported to be rejecting—recognized that Section 253(a) "articulates a reasonably broad limitation on state and local governments' authority to regulate telecommunications providers," *Level 3 Communications*, 477 F.3d at 531-532; that a challenging provider "need not show a complete or insurmountable prohibition," *id.* at 533 (citing *TCG New York*, 305 F.3d at 76); and that the provider instead "must show an existing material interference with the ability to compete in a fair and balanced market," *ibid.* (citing *California Payphone Association*, 12 F.C.C.R. at 14,206 (¶ 31)). Still more confusingly, the court at one point suggested that the "material interference" standard was even *more*

exacting than the standard it was seemingly applying. See *id.* at 534 (concluding that there was "insufficient evidence from [the challenging provider] of any actual or effective prohibition, *let alone* one that materially inhibits its operations") (emphasis added). Although the Eighth Circuit purported to apply (and apparently did apply) a more stringent standard than the other circuits, it is thus somewhat unclear just how stringent that standard is in practice.

3. Like the Eighth Circuit, the en banc Ninth Circuit in this case expressly repudiated the approaches of the First, Second, and Tenth Circuits, see App., *infra*, 9a, and noted that it was insufficient for a challenging provider to show "the mere possibility of prohibition," *id.* at 10a-11a (quoting *Level 3 Communications*, 477 F.3d at 533). Unlike the Eighth Circuit, however, the Ninth Circuit did not suggest that a provider could satisfy Section 253(a) by showing that a regulation "material[ly] interfere[d] with" the ability of any entity to provide telecommunications service, or by identifying a prohibition that was short of "complete or insurmountable." *Level 3 Communications*, 477 F.3d at 533. Instead, the court overruled its earlier decision in *City of Auburn* (which, it noted, had recognized that a regulation could be preempted if it "create[d] a substantial . . . barrier" to the provision of telecommunications service, App., *infra*, 8a-9a (quoting *City of Auburn*, 260 F.3d at 1176)), and held that a regulation is preempted by Section 253(a) only if it effects a complete ban on the provision of such service. *Id.* at 16a.[5]

---

[5] While the Ninth Circuit suggested that a plaintiff could succeed in a challenge to a regulation if an ordinance "effect[ed] a significant gap in service coverage," App., *infra*, 16a, such a coverage gap would be tantamount to a complete ban, insofar as the carrier would be unable to provide any service in the area of the "gap" (and would

Regardless of how the Eighth Circuit's interpretation is characterized, therefore, it is clear that the Ninth Circuit's interpretation at a minimum conflicts with the interpretations of the First, Second, and Tenth Circuits. Because the decision below was issued by the en banc court, moreover, it is exceedingly unlikely that the Ninth Circuit will reconsider its interpretation. The resulting circuit conflict on the meaning of Section 253(a) merits this Court's review.

B. The Court Of Appeals' Interpretation Of Section 253(a) Is Erroneous

The en banc Ninth Circuit erred, moreover, by holding that a state or local regulation that does not expressly prohibit the provision of telecommunications service is preempted by Section 253(a) only if it effects a complete ban on the provision of such service. See App., *infra*, 16a.

1. Section 253(a) provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. 253(a). As many courts have noted, the language of Section 253 in general—and Section 253(a) in particular—is far from clear. See, *e.g.*, *New Jersey Payphone Ass'n* v. *Town of West New York*, 299 F.3d 235, 240 (3d Cir. 2002); *City of Abilene* v. *FCC*, 164 F.3d 49, 52 (D.C. Cir. 1999). As this Court has already (if implicitly) recognized, however, the text of Section 253(a) comfortably accommodates an interpretation under which any regulation that substan-

---

be unable to provide adequate service to the surrounding area). The Ninth Circuit did not identify any other circumstance in which a challenge to a regulation that stopped short of a complete ban would succeed under its standard.

tially impedes an entity from providing telecommunications service is preempted. See, *e.g.*, *Verizon Communications, Inc.* v. *FCC*, 535 U.S. 467, 491 (2002) (noting that Section 253(a) "prohibits state and local regulation that *impedes* the provision of 'telecommunications service'") (emphasis added).

Such an interpretation of Section 253(a) is preferable to the Ninth Circuit's cramped interpretation for two principal reasons. First, that interpretation, unlike the Ninth Circuit's interpretation, gives meaningful content to the second clause of Section 253(a), which preempts regulations that have the "effect of prohibiting" the ability to provide telecommunications service (in contrast with the first clause, which preempts regulations that "prohibit" the ability to do so). Cf. *Nixon* v. *Missouri Municipal League*, 541 U.S. 125, 138 (2004) (rejecting a reading of Section 253(a) under which the provision "would often accomplish nothing"). Second, that interpretation better effectuates Congress's underlying policy objectives in enacting the Telecommunications Act in general (and Section 253(a) in particular): namely, to eliminate barriers to competition and to ensure that telecommunications providers would not be subject to intrusive state and local regulation. See pp. 2-4, *supra*; cf. *Nixon*, 541 U.S. at 138 (rejecting an interpretation under which Section 253(a) "would hold out no promise of a national consistency").

2. In adopting its avowedly "narrow" construction of Section 253(a), see App., *infra*, 11a, the Ninth Circuit committed several fundamental errors of statutory interpretation.

a. The Ninth Circuit criticized those decisions that had adopted a broader construction of Section 253(a) (including its prior decision in *City of Auburn*) on the ground that they attached excessive significance to the

provision's use of the word "may." See App., *infra*, 8a-11a. In so reasoning, however, the Ninth Circuit was attacking a strawman. Neither the *City of Auburn* nor the decisions of other circuits placed substantial weight on the use of the word "may"; instead, those decisions merely sought to give meaning to the successive phrase "have the effect of prohibiting." See *City of Auburn*, 260 F.3d at 1176 (holding that "[t]he ordinances at issue in the present case include several features that, in combination, have the effect of prohibiting the provision of telecommunications services"); see also *Puerto Rico Telephone*, 450 F.3d at 18; *City of Santa Fe*, 380 F.3d at 1271; *TCG New York*, 305 F.3d at 76.

Although the Ninth Circuit confidently asserted that the text of Section 253(a) is "unambiguous," see App., *infra*, 11a, it made no effort to explain why the "have the effect of prohibiting" clause of Section 253(a) should be limited to regulations that effect a complete ban, rather than regulations that erect "substantial . . . barrier[s]" to the provision of telecommunications service. *Id.* at 8a-9a (quoting *City of Auburn*, 260 F.3d at 1176). Instead, the court merely stated (and repeatedly restated) the unobjectionable proposition that Section 253(a) preempts regulations that either "actually prohibit or effectively prohibit" the ability to provide such service. See, *e.g.*, *id.* at 11a (citation omitted).

b. The Ninth Circuit also erred by suggesting that its construction of Section 253(a) was "consistent with the FCC's." App., *infra*, 11a. In so doing, the court cited an FCC ruling for the generic proposition that Section 253(a) preempts regulations that either "actually prohibit or effectively prohibit" the ability to provide telecommunications service. *Ibid.* (citing *California Payphone Association*, 12 F.C.C.R. at 14,209 (¶ 38)).

In the same ruling on which the Ninth Circuit relied, however, the FCC made clear that, in determining whether a regulation "'has the effect of prohibiting' the ability of any entity to provide [telecommunications] service," it would "consider whether the [regulation] materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *California Payphone Association*, 12 F.C.C.R. at 14,206 (¶ 31).[6] While the Ninth Circuit suggested that the FCC's interpretation of Section 253(a) would be entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), see App., *infra*, 11a, it seemingly made no effort to come to terms with the FCC's actual interpretation of the operative statutory language.

c. The Ninth Circuit compounded its other interpretive errors by erroneously relying on the standard for facial challenges articulated in *United States* v. *Salerno*, 481 U.S. 739 (1987), in order to narrow still further the

---

[6] All of the other courts of appeals to have addressed the construction of Section 253(a) have discussed (and, to varying degrees, relied upon) the quoted language from the FCC's ruling in *California Payphone Association*. See *Level 3 Communications*, 477 F.3d at 533; *Puerto Rico Telephone*, 450 F.3d at 18; *City of Santa Fe*, 380 F.3d at 1271; *TCG New York*, 305 F.3d at 76. The FCC, moreover, has repeatedly cited (and relied upon) that language in subsequent rulings. See *In re Public Utility Comm'n*, 13 F.C.C.R. 3460, 3470 (¶ 22) (1997), petition for review denied, 164 F.3d 49 (D.C. Cir. 1999); *In re Low Tech Designs, Inc.*, 13 F.C.C.R. 1755, 1775-1776 (¶ 38) (1997); *In re Pittencrieff Communications, Inc.*, 13 F.C.C.R. 1735, 1751-1752 (¶ 32) (1997), petition for review denied, 168 F.3d 1332 (D.C. Cir. 1999); *TCI Cablevision*, 12 F.C.C.R. at 21,439 (¶ 98); see also *In re Cheyenne River Sioux Tribe Telephone Auth.*, 17 F.C.C.R. 16,916, 16,936-16,937 (2002) (statement of Commissioner Copps).

standard for preemption under Section 253(a) in the context of a challenge to an ordinance. In *Salerno*, this Court held that a plaintiff bringing a facial challenge to a statute must show that the statute is invalid in all of its applications. See *id.* at 745. Section 253(a), however, expressly preempts any "statute," "regulation," or other "legal requirement" that prohibits or has the effect of prohibiting the ability of any entity to provide telecommunications services. By its terms, therefore, Section 253(a) provides the entire substantive standard for a preemption challenge to a statute or regulation (such as the San Diego County Wireless Ordinance), without any need to import *Salerno* into the analysis. The Ninth Circuit thus erred by relying on *Salerno* to reach the conclusion that the Wireless Ordinance could not be preempted unless it effectively resulted in a complete ban on the provision of telecommunications service. See, *e.g.*, App., *infra*, 16a. This Court should grant review in order to eliminate the resulting circuit conflict and correct the Ninth Circuit's seriously flawed interpretation.

C. The Question Presented Is An Important One That Is Ripe For This Court's Review

The question presented in this case—*i.e.*, whether Section 253(a) preempts a state or local regulation that substantially impedes the provision of telecommunications service—is a recurring one of obvious importance to the telecommunications industry. As noted above, Section 253(a) is widely recognized as one of the most significant provisions of the Telecommunications Act of 1996. See p. 3, *supra*. The interpretation of Section 253(a) has a direct effect on the ability of telecommunications providers to offer more, and more advanced, telecommunications services, consistent with the overriding purpose of the Telecommunications Act. Indeed, the

willingness of telecommunications providers to make investments in new technologies in the first place depends crucially on their ability to implement those technologies free of interference from state and local law. At a minimum, therefore, the question presented here is comparable in importance to questions this Court has previously considered concerning the interpretation of this or other provisions of the Telecommunications Act. Cf., *e.g.*, *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113 (2005) (whether an individual may enforce the limitations in 47 U.S.C. 332(c)(7) through an action under 42 U.S.C. 1983); *Nixon*, 541 U.S. at 125 (whether the phrase "any entity" in Section 253(a) includes political subdivisions of States).

Because state and local governments have continually sought to impose restrictions on the operations of telecommunications companies, moreover, questions concerning the scope of preemption under Section 253(a) arise with remarkable frequency. As the en banc Ninth Circuit recognized in the decision below, lower courts have considered challenges to local regulations under Section 253(a) "in tens of cases across this nation's towns and cities," App., *infra*, 9a (citing cases), and numerous other cases are currently pending nationwide, see, *e.g.*, *Newpath Networks LLC* v. *City of Irvine*, Nos. 08-55755 & 08-56010 (9th Cir. appeal filed May 2, 2008) (challenge to local wireless ordinance); *NextG Networks of California, Inc.* v. *City of Huntington Beach*, No. 8:07-cv-01471 (C.D. Cal. filed Dec. 27, 2007) (same); *New York SMSA Limited Partnership* v. *Town of Clarkstown*, No. 7:07-cv-07637-CS (S.D.N.Y. filed Aug. 28, 2007) (same). Especially in light of the ongoing proliferation of litigation, this Court's intervention is warranted in order to provide definitive resolution concerning the interpretation of Section 253(a).

This Court's intervention is especially warranted because the current inconsistency in the interpretation of Section 253(a) among the circuits itself disserves one of the primary objectives of the Telecommunications Act: namely, to avoid subjecting telecommunications providers in general (and wireless providers in particular) to "an inconsistent and, at times, conflicting patchwork of requirements," depending on where the providers' facilities are located. H.R. Rep. No. 204, 104th Cong., 1st Sess. 94 (1995). As matters currently stand, in the Ninth Circuit, virtually any regulation that does not expressly prohibit the provision of telecommunications service (with the exception of an entirely fanciful regulation providing that "all [wireless] facilities be underground" or that "no wireless facilities be located within one mile of a road," App., *infra*, 16a) will be upheld as not preempted by Section 253(a). By contrast, in the First, Second, and Tenth Circuits (and possibly even in the Eighth Circuit), a regulation that substantially impedes the provision of telecommunications service will be invalidated, even if it does not result in a complete ban. The resulting disuniformity necessitates immediate intervention without further percolation.

Finally, if the decision below is allowed to stand, it threatens to embolden localities in the Nation's largest and most populous circuit—and, indeed, beyond—to enact burdensome ordinances similar to the County of San Diego's. In fact, in the short time since the decision below, the City of Berkeley, California, has already withdrawn proposed changes to its preexisting wireless ordinance that would have eliminated some of its most onerous requirements—changes that, ironically enough, were initially proposed in response to the panel's opinion. See Memorandum from Wendy Cosin, Deputy Planning Director, to Members of the Berkeley Planning Commis-

sion, at 1-3 (Nov. 5, 2008) <http://www.tinyurl.com/berkeleymemo>. As noted above, moreover, litigation concerning other ordinances is currently ongoing in courts in the Ninth Circuit—and the decision below will obviously make it more difficult for the challenges to those ordinances to succeed. See p. 22, *supra*. In light of the clear and substantial circuit conflict concerning the scope of Section 253(a) and the vital importance of the question presented, further review is plainly warranted.

D. This Case Is An Ideal Vehicle For Considering The Question Presented

Should the Court decide to resolve the circuit conflict concerning the interpretation of Section 253(a), this case is an optimal vehicle for the Court's review.

1. This case cleanly presents the question whether Section 253(a) preempts a state or local regulation that substantially impedes the provision of telecommunications service, and it is clear that the resolution of that question would be outcome-dispositive here. As the district court and the court of appeals panel correctly determined, the San Diego County Wireless Ordinance contains numerous features that, when viewed either collectively or in isolation, erect substantial obstacles to the provision of wireless service. See App., *infra*, 47a-48a (court of appeals panel); *id.* at 70a-74a (district court).

Most notably, the Wireless Ordinance imposes a host of substantive and procedural requirements for the placement and design of wireless facilities, ranging from the requirement that a provider agree to share the proposed facility with other providers, Zoning Ord. § 6984(c)(9), to the requirement that the provider supply a "visual impact analysis" and a detailed narrative with information about the facility's design and maintenance, *id.* § 6984(b)-(c). Lower courts applying a substantial-

impediment standard have routinely invalidated such elaborate requirements under Section 253(a). See, *e.g.*, *Qwest Communications, Inc.* v. *City of Berkeley*, 433 F.3d 1253, 1257 (9th Cir. 2006); *City of Santa Fe*, 380 F.3d at 1270; *City of Auburn*, 260 F.3d at 1175-1176. The burden imposed by those substantive and procedural requirements is compounded by the fact that the County retains the discretion to grant or deny any application requiring a use permit based on "[a]ny * * * relevant impact of the proposed use," Zoning Ord. § 7358(a)(6), and to revoke or modify the permit at any time, *id.* § 7382. As courts have noted in invalidating similar provisions, such unfettered discretion constitutes the "ultimate cudgel" that a locality may use to deny the provision of wireless service. *City of Auburn*, 260 F.3d at 1176; see, *e.g.*, *City of Santa Fe*, 380 F.3d at 1270. Because the Wireless Ordinance constitutes nothing less than a shadow regulatory regime for the provision of wireless services within San Diego County, there can be no doubt that it substantially impedes the provision of telecommunications service within the county. Under the correct interpretation of Section 253(a), therefore, the Wireless Ordinance would comfortably be held to be preempted.

Before the court of appeals, respondents contended that petitioner's preemption claim was governed not by Section 253(a), but rather by 47 U.S.C. 332(c)(7), which provides, in the specific context of "decisions" concerning the placement of wireless facilities, that a state or local regulation "shall not prohibit or have the effect of prohibiting the provision of personal wireless services." App., *infra*, 7a. To the extent respondents renew that contention before this Court, however, it would not give rise to any sort of vehicle problem. As a preliminary

matter, that contention plainly lacks merit.[7] But more broadly, as the en banc court of appeals noted, the "relevant" language in each provision—*i.e.*, that a state or local regulation that either prohibits or effectively prohibits the provision of services is preempted—is "identical." See *id.* at 13a. Because "the legal standard is the same under either [provision]," the en banc court of appeals ultimately (and correctly) held that it was unnecessary to address respondents' contention. *Ibid.* For the same reason, this Court would not need to address that contention either, and there is therefore no obstacle to the Court's reaching, and resolving, the question presented here.

2. The question presented in this case is also presented in another petition currently pending before the Court. See *Level 3 Communications, L.L.C.* v. *City of St. Louis*, No. 08-626 (filed Nov. 7, 2008). That case involves a challenge by a non-incumbent landline provider to a particular licensing agreement with a local government, pursuant to which the provider agreed to pay certain fees, and to submit to certain regulatory requirements, as a condition of obtaining access to public rights-of-way. See *Level 3 Communications*, 477 F.3d at 530-531 (08-626 Pet. App. 24a-25a). At a minimum, the Court should grant review in this case, because it is an ideal

---

[7] That is because Section 253(a) applies to challenges to "statutes" and "regulations" (such as the San Diego County Wireless Ordinance), whereas Section 332(c)(7) applies only to challenges to particular "decisions" made by local authorities. As the court of appeals panel explained, therefore, respondents' contention "ignores the plain meaning and structure of the [Telecommunications Act]." App., *infra*, 40a. Tellingly, respondents have cited no decision holding that a provider may bring a preemption claim like petitioner's only under Section 332(c)(7) and not under Section 253(a).

vehicle for resolving the circuit conflict concerning the interpretation of Section 253(a). Because *Level 3 Communications* arises in a distinct but complementary factual context, the Court may wish to grant review in that case as well (and to consolidate the cases for briefing and oral argument).

Level 3 Communications, however, presents one additional complication that this case does not. Because the provider in *Level 3 Communications* was specifically seeking access to public rights-of-way, that case implicates the meaning not only of Section 253(a), but also of Section 253(c), which preserves the authority of state and local governments to "manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers[] on a competitively neutral and nondiscriminatory basis." 47 U.S.C. 253(c).

In its petition before this Court, the provider in *Level 3 Communications* asks the Court not only to resolve the circuit conflict concerning the interpretation of Section 253(a), but also an additional (and less substantial) circuit conflict on the issue whether a regulation may be preempted under Section 253(c) regardless whether it falls within the scope of Section 253(a). See 08-626 Pet. 23, 29-30.[8] And the provider appears to go further and to encourage the Court to address fact-intensive issues concerning whether the requirements in that case were "saved" by Section 253(c), regardless whether Section

---

[8] The provider in *Level 3 Communications* does not appear to have contended before the Eighth Circuit that Section 253(c) provided a discrete basis for preemption. To the contrary, in its brief on appeal, the provider asserted that the Sixth Circuit's decision in *TCG Detroit* v. *City of Dearborn*, 206 F.3d 618 (2000)—the sole court of appeals decision to adopt such a rule—was "largely devoid of any analysis." Br. of Appellee at 39, *Level 3 Communications*, *supra* (Nos. 06-1398 & 06-1459).

253(c) merely creates an exception to preemption under Section 253(a) or provides a discrete basis for preemption. Specifically, the provider seemingly asks the Court to consider (and decide) whether the challenged fees constitute "fair and reasonable compensation," and whether the challenged regulatory requirements constitute "manage[ment] [of] the public rights-of-way * * * on a competitively neutral and nondiscriminatory basis." See *id.* at 21-23.[9] This case, by contrast, presents only the pure legal issue concerning the interpretation of Section 253(a), shorn of any potentially complicating legal or factual issues concerning the interpretation or application of Section 253(c).[10]

Regardless whether the Court grants the petition in *Level 3 Communications*, however, it should grant the instant petition. This case particularly merits review because it arises in perhaps the most important context in which Section 253(a) currently applies: namely, the preemption of local regulations targeted at the wireless communications industry. Although the wireless industry constituted only a fraction of the overall telecommunications industry at the time the Telecommunications

---

[9] The district court in *Level 3 Communications* held that some of the challenged requirements, but not others, were saved by Section 253(c). See 405 F. Supp. 2d 1047, 1056-1063 (E.D. Mo. 2005) (08-626 Pet. App. 49a-67a). The court of appeals did not reach any issue concerning the application of Section 253(c), in light of its holding that the provider had failed to establish preemption under Section 253(a). See 477 F.3d at 534 & n.2 (08-626 Pet. App. 33a & n.2).

[10] Although petitioner in this case claimed in its complaint that the San Diego County Wireless Ordinance discriminated against some providers using public rights-of-way, in violation of Section 253(c), petitioner abandoned that claim on appeal, and respondents did not contend on appeal that the Wireless Ordinance was saved by Section 253(c). See pp. 7 n.2 & 8 n.3, *supra*.

Act of 1996 was enacted, there are now more than 241 million mobile telephone users in the United States, and nearly the entire population lives in areas in which mobile telephone service is provided. See FCC, Twelfth Annual Report on the State of Competitive Market Conditions With Respect to the Wireless Industry, Report No. 08-28, at 5, 6 (2008) <http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-28A1.pdf>.

The demand for wireless services continues to grow, and, in order to satisfy that demand (and to provide access to new technologies), wireless providers are under continual pressure to expand and improve their networks. At the same time, however, local communities are often resistant, even openly hostile, to the construction or modification of wireless facilities. See Steven J. Eagle, *Wireless Telecommunications, Infrastructure Security, and the NIMBY Problem*, 54 Cath. U. L. Rev. 445, 454 (2005) (noting that, "[w]hile the majority of adult Americans now enjoy the benefits of wireless communications," those benefits are "vulnerable to more parochial concerns" and local governments "are in a practical position to block or hinder the national telecommunications network"); see also, *e.g.*, Malcolm J. Tuesley, Note, *Not in My Backyard: The Siting of Wireless Communications Facilities*, 51 Fed. Comm. L.J. 887 (1999).

As a practical matter, the Court's decision in this case will determine how far local governments can go in imposing restrictions on the placement and design of wireless facilities. If the Ninth Circuit's decision is allowed to stand, one of the central promises of the Telecommunications Act—that wireless providers can offer services free of intrusive and inconsistent state and local regulation—will go unfulfilled. The question presented in this case is of obvious and enormous practical and legal significance. This case therefore warrants the Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DANIEL T. PASCUCCI
NATHAN R. HAMLER
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.
3580 Carmel Mountain Road, Suite 300
San Diego, CA 92130
(858) 314-1500

KANNON K. SHANMUGAM
THOMAS J. ROBERTS
SARAH F. TEICH
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000

DECEMBER 2008

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 05-56075, 05-56435

SPRINT TELEPHONY PCS, L.P., A DELAWARE LIMITED PARTNERSHIP, PLAINTIFF-APPELLANT/CROSS-APPELLEE, AND PACIFIC BELL WIRELESS LLC, A NEVADA LIMITED LIABILITY COMPANY, DBA CINGULAR WIRELESS, PLAINTIFF,

v.

COUNTY OF SAN DIEGO, A DIVISION OF THE STATE OF CALIFORNIA; GREG COX, IN HIS CAPACITY AS A SUPERVISOR OF THE COUNTY OF SAN DIEGO; DIANNE JACOB, IN HER CAPACITY AS A SUPERVISOR OF THE COUNTY OF SAN DIEGO; PAM SLATER, IN HER CAPACITY AS A SUPERVISOR OF THE COUNTY OF SAN DIEGO; RON ROBERTS, IN HIS CAPACITY AS A SUPERVISOR OF THE COUNTY OF SAN DIEGO; BILL HORN, IN HIS CAPACITY AS A SUPERVISOR OF THE COUNTY OF SAN DIEGO, DEFENDANTS-APPELLEES/CROSS-APPELLANTS.

Filed: Sept. 11, 2008

Before: ALEX KOZINSKI, Chief Judge, and ANDREW J. KLEINFELD, HAWKINS, A. WALLACE TASHIMA, SIDNEY R. THOMAS, BARRY G.

SILVERMAN, SUSAN P. GRABER, RONALD M. GOULD, MARSHA S. BERZON, RICHARD C. TALLMAN, and JAY S. BYBEE, Circuit Judges.

Opinion by Judge GRABER; Concurrence by Judge GOULD.

GRABER, Circuit Judge.

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in U.S.C. Titles 15, 18 & 47) ("the Act"), precludes state and local governments from enacting ordinances that prohibit or have the effect of prohibiting the provision of telecommunications services, including wireless services. In 2003, Defendant County of San Diego enacted its Wireless Telecommunications Facilities ordinance. San Diego County Ordinance No. 9549, § 1 (codified as San Diego County Zoning Ord. §§ 6980-6991, 7352 ("the Ordinance")). The Ordinance imposes restrictions and permit requirements on the construction and location of wireless telecommunications facilities. Plaintiff Sprint Telephony PCS alleges that, on its face, the Ordinance prohibits or has the effect of prohibiting the provision of wireless telecommunications services, in violation of the Act. The district court permanently enjoined the County from enforcing the Ordinance, and a three-judge panel of this court affirmed. *Sprint Telephony PCS, L.P. v. County of San Diego*, 490 F.3d 700 (9th Cir. 2007). We granted rehearing en banc, 527 F.3d 791 (9th Cir. 2008), and we now reverse.

FACTUAL AND PROCEDURAL HISTORY

The County of San Diego enacted the Ordinance "to establish comprehensive guidelines for the placement, design and processing of wireless telecommunications

facilities in all zones within the County of San Diego." San Diego County Ordinance No. 9549, § 1. The Ordinance categorizes applications for wireless telecommunications facilities into four tiers, depending primarily on the visibility and location of the proposed facility. San Diego County Zoning Ordinance § 6985. For example, an application for a low-visibility structure in an industrial zone generally must meet lesser requirements than an application for a large tower in a residential zone. *Id.*

Regardless of tier, the Ordinance imposes substantive and procedural requirements on applications for wireless facilities. For example, non-camouflaged poles are prohibited in residential and rural zones; certain height and setback restrictions apply in residential zones; and no more than three facilities are allowed on any site, unless "a finding is made that co-location of more facilities is consistent with community character." *Id.* An applicant is required to identify the proposed facility's geographic service area, to submit a "visual impact analysis," and to describe various technical attributes such as height, maintenance requirements, and acoustical information, although some exceptions apply. *Id.* § 6984. The proposed facility must be located within specified "preferred zones" or "preferred locations," unless those locations are "not technologically or legally feasible" or "a finding is made that the proposed site is preferable due to aesthetic and community character compatibility." *Id.* § 6986. The proposed facility also must meet many design requirements, primarily related to aesthetics. *Id.* § 6987. The applicant also must perform regular maintenance of the facility, including graffiti removal and proper landscaping. *Id.* § 6988.

General zoning requirements also apply. For example, hearings are conducted before a permit is granted,

id. § 7356, and on appeal, if requested, *id.* § 7366(h). Before a permit is granted, the zoning board must find:

> That the location, size, design, and operating characteristics of the proposed use will be compatible with adjacent uses, residents, buildings, or structures, with consideration given to:
>
> 1. Harmony in scale, bulk, coverage and density;
>
> 2. The availability of public facilities, services and utilities;
>
> 3. The harmful effect, if any, upon desirable neighborhood character;
>
> 4. The generation of traffic and the capacity and physical character of surrounding streets;
>
> 5. The suitability of the site for the type and intensity of use or development which is proposed; and to
>
> 6. Any other relevant impact of the proposed use[.]

Id. § 7358(a). The decision-maker retains discretionary authority to deny a use permit application or to grant the application conditionally. *Id.* § 7362.

Soon after the County enacted the Ordinance, Sprint brought this action, alleging that the Ordinance violates 47 U.S.C. § 253(a)[1] because, on its face, it prohibits or has

---

[1] In its complaint, Sprint also alleged that the Ordinance violated another subsection of 47 U.S.C. § 253. The district court dismissed that cause of action for failure to prosecute, and Sprint does not challenge that dismissal on appeal.

the effect of prohibiting Sprint's ability to provide wireless telecommunications services. Sprint sought injunctive and declaratory relief under the Supremacy Clause and 28 U.S.C. § 1331, and damages and attorney fees under 42 U.S.C. § 1983. The County argued that § 253(a) did not apply to the Ordinance, because 47 U.S.C. § 332(c)(7) exclusively governs wireless regulations, and that, in any event, the Ordinance is not an effective prohibition on the provision of wireless services. The County also argued that damages and attorney fees are unavailable because Congress did not create a private right of action enforceable under 42 U.S.C. § 1983.

The district court first held that facial challenges to a local government's wireless regulations could be brought under either § 253(a) or § 332(c)(7), because neither is exclusive. The district court next held, relying on our decision in *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), that the Ordinance violated § 253(a). The district court therefore permanently enjoined the County from enforcing the Ordinance against Sprint. Finally, the district court held that a claim under 42 U.S.C. § 1983 for a violation of § 253(a) was not cognizable and granted summary judgment to the County on that claim. The parties cross-appealed. A three-judge panel of this court affirmed, and we granted rehearing en banc.

STANDARDS OF REVIEW

We review for abuse of discretion the district court's grant of a permanent injunction, but review its underlying determinations "by the standard that applies to that determination." *Ting v. AT&T*, 319 F.3d 1126, 1134-35 (9th Cir. 2003).

DISCUSSION

Sprint argues that, on its face, the Ordinance prohibits or has the effect of prohibiting the provision of wireless telecommunications services, in violation of the Act. As a threshold issue, the parties dispute *which* provision of the Act—47 U.S.C. § 253(a) or 47 U.S.C. § 332(c)(7)(B)(i)(II)—applies to this case.

A. *The Effective Prohibition Clauses of 47 U.S.C. § 253(a) and 47 U.S.C. § 332(c)(7)(B)(i)(II)*

When Congress passed the Act, it expressed its intent "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." 110 Stat. at 56; *see also Ting*, 319 F.3d at 1143 ("[T]he purpose of the . . . Act is to 'provide for a pro-competitive, deregulatory national policy framework . . . by opening all telecommunications markets to competition.' " (quoting H.R. Rep. No. 104-458, at 113 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 124, 124)). The Act "represents a dramatic shift in the nature of telecommunications regulation." *Cablevision of Boston, Inc. v. Pub. Improvement Comm'n*, 184 F.3d 88, 97 (1st Cir. 1999); *see also Ting*, 319 F.3d at 1143 (characterizing the Act as a "dramatic break with the past"). Congress chose to "end[ ] the States' longstanding practice of granting and maintaining local exchange monopolies." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 405 (1999) (Thomas, J., concurring in part, dissenting in part).

Congress did so by enacting 47 U.S.C. § 253, a new statutory section that preempts state and local regulations that maintain the monopoly status of a telecommu-

nications service provider. *See Cablevision of Boston*, 184 F.3d at 98 ("Congress apparently feared that some states and municipalities might prefer to maintain the monopoly status of certain providers . . . Section 253(a) takes that choice away from them . . . . "). Section 253(a) states: "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

The Act also contained new provisions applicable only to *wireless* telecommunications service providers. The House originally proposed legislation requiring the Federal Communications Commission ("FCC") to regulate directly the placement of wireless telecommunications facilities. *See* H.R. Rep. No. 104-204(I), § 107, at 94 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 61. But the House and Senate conferees decided instead to "preserve[ ] the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth in the conference agreement." H.R. Rep. No. 104-458, § 704, at 207-08 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 124, 222.

Accordingly, at the same time, Congress also enacted 47 U.S.C. § 332(c)(7). Section 332(c)(7)(A) preserves the authority of local governments over zoning decisions regarding the placement and construction of wireless service facilities, subject to enumerated limitations in § 332(c)(7)(B). One such limitation is that local regulations "shall not prohibit or have the effect of prohibiting the provision of personal wireless services." *Id.* § 332(c)(7)(B)(i)(II).

We have interpreted § 332(c)(7)(B)(i)(II) in accordance with its text. In *MetroPCS, Inc. v. City of San*

Francisco, 400 F.3d 715, 730-31 (9th Cir. 2005), we held that a locality runs afoul of that provision if (1) it imposes a "city-wide general ban on wireless services" or (2) it actually imposes restrictions that amount to an effective prohibition.

Our interpretation of § 253(a), however, has not hewn as closely to its nearly identical text. Again, § 253(a) states: "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." In *Auburn*, we became one of the first federal circuit courts to interpret that provision. We surveyed district court decisions and adopted their broad interpretation of its preemptive effect. *Auburn*, 260 F.3d at 1175-76. In the course of doing so, we quoted § 253(a) somewhat inaccurately, inserting an ellipsis in the text of § 253(a). *Id.* at 1175. We held that "[s]ection 253(a) preempts 'regulations that not only "prohibit" outright the ability of any entity to provide telecommunications services, but also those that "may ... have the effect of prohibiting" the provision of such services.' " *Id.* (quoting *Bell Atl.-Md., Inc. v. Prince George's County*, 49 F. Supp. 2d 805, 814 (D.Md. 1999), *vacated and remanded on other grounds*, 212 F.3d 863 (4th Cir. 2000)); *see also Qwest Commc'ns Inc. v. City of Berkeley*, 433 F.3d 1253, 1258 (9th Cir. 2006) (invalidating the locality's regulations because they "may have the effect of prohibiting telecommunications companies from providing services"); *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1241 (9th Cir. 2004) (emphasizing that "regulations that *may* have the effect of prohibiting the provision of telecommunications services are preempted [by § 253(a)]"). It followed from that truncated version of the statute that, if a local regulation merely "create[s] a substantial

. . . barrier" to the provision of services or "allows a city to bar" provision of services, *Auburn*, 260 F.3d at 1176, then § 253(a) preempts the regulation. Applying that broad standard, we held that the municipal regulations at issue in *Auburn* were preempted because they imposed procedural requirements, charged fees, authorized civil and criminal penalties, and—"the ultimate cudgel"—reserved discretion to the city to grant, deny, or revoke the telecommunications franchises. *Id.*

Our expansive reading of the preemptive effect of § 253(a) has had far-reaching consequences. The *Auburn* standard has led us to invalidate several local regulations. *See Berkeley*, 433 F.3d at 1258 (holding that Berkeley's regulations were preempted by § 253(a)); *Portland*, 385 F.3d at 1239-42 (reversing the district court's holding that Portland's regulations survived preemption and remanding for additional analysis). Three of our sister circuits also have followed our broad interpretation of § 253(a), albeit with little discussion. *See P.R. Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006) (citing *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1269 (10th Cir. 2004)); *Santa Fe*, 380 F.3d at 1270 (quoting *Auburn*, 260 F.3d at 1176); *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002). Applying our *Auburn* standard, federal district courts have invalidated local regulations in tens of cases across this nation's towns and cities. *See, e.g., NextG Networks of Cal., Inc. v. County of Los Angeles*, 522 F. Supp. 2d 1240, 1253 (C.D. Cal. 2007); *TC Sys., Inc. v. Town of Colonie*, 263 F. Supp. 2d 471, 481-84 (N.D.N.Y. 2003); *XO Mo., Inc. v. City of Maryland Heights*, 256 F. Supp. 2d 987, 996-98 (E.D. Mo. 2003).

But the tension between the *Auburn* standard and the full text of § 253(a) has not gone unnoticed. *See City*

of Portland v. Elec. Lightwave, Inc., 452 F. Supp. 2d 1049, 1059 (D. Or. 2005) ("The Ninth Circuit's interpretation of the scope of section 253(a) appears to depart from the plain meaning of the statute . . . . "); *Qwest Corp. v. City of Portland*, 200 F. Supp. 2d 1250, 1255 (D. Or. 2002) (construing the *Auburn* standard as dictum because reading § 253(a) as preempting regulations that *may* have the effect of prohibiting telecommunications services "simply misreads the plain wording of the statute"), *rev'd by Portland*, 385 F.3d at 1241 ("Like it or not, both we and the district court are bound by our prior ruling [in *Auburn*]."); *see also Newpath Networks LLC v. City of Irvine*, No. SACV-06-550, 2008 WL 2199689, at *4 (C.D. Cal. Mar. 10, 2008) (noting that "the Court is sympathetic to Irvine's argument that judicial decisions in this area have not been particularly instructive in telling municipalities how they may regulate in accordance with the . . . Act"). Recently, the Eighth Circuit rejected the *Auburn* standard and held that, to demonstrate preemption, a plaintiff "must show actual or effective prohibition, rather than the mere possibility of prohibition." *Level 3 Commc'ns, L.L.C. v. City of St. Louis*, 477 F.3d 528, 532-33 (8th Cir. 2007); *see also AT&T Commc'ns of Pac. Nw., Inc. v. City of Eugene*, 177 Or. App. 379, 35 P.3d 1029, 1047-48 (2001) (implicitly rejecting the *Auburn* standard).

We find persuasive the Eighth Circuit's and district courts' critique of *Auburn*. Section 253(a) provides that "[n]o State or local statute or regulation . . . may prohibit or have the effect of prohibiting . . . provi[sion of] . . . telecommunications service." In context, it is clear that Congress' use of the word "may" works in tandem with the negative modifier "[n]o" to convey the meaning that "state and local regulations shall not prohibit or have the effect of prohibiting telecommunications ser-

vice." Our previous interpretation of the word "may" as meaning "might possibly" is incorrect. We therefore overrule *Auburn* and join the Eighth Circuit in holding that "a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition." *Level 3 Commc'ns*, 477 F.3d at 532.

Although our conclusion rests on the unambiguous text of § 253(a), we note that our interpretation is consistent with the FCC's. *See In re Cal. Payphone Ass'n*, 12 F.C.C.R. 14191, 14209 (1997) (holding that, to be preempted by § 253(a), a regulation "would have to actually prohibit or effectively prohibit" the provision of services); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (holding that the two-step *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), analysis applies to FCC rulings). Were the statute ambiguous, we would defer to the FCC under *Chevron*, as its interpretation is certainly reasonable. 467 U.S. at 843. Our narrow interpretation of the preemptive effect of § 253(a) also is consistent with the presumption that "express preemption statutory provisions should be given a narrow interpretation." *Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n*, 410 F.3d 492, 496 (9th Cir. 2005).

Our present interpretation of § 253(a) is buttressed by our interpretation of the same relevant text in § 332(c)(7)(B)(i)(II)—"prohibit or have the effect of prohibiting." In *MetroPCS*, to construe § 332(c)(7)(B)(i)(II), we focused on the *actual* effects of the city's ordinance, not on what effects the ordinance *might possibly* allow. 400 F.3d at 732-34. Indeed, we rejected the plaintiff's argument that, because the city's zoning ordinance

granted discretion to the city to reject an application based on vague standards such as "necessity," the ordinance necessarily constituted an effective prohibition. *Id.* at 724, 732. Consequently, our interpretation of the "effective prohibition" clause of § 332(c)(7)(B)(i)(II) differed markedly from *Auburn's* interpretation of the same relevant text in § 253(a). *Compare MetroPCS*, 400 F.3d at 731-35 (analyzing, under § 332(c)(7)(B)(i)(II), whether the city's ordinance and decision *actually* have the effect of prohibiting the provision of wireless services), *with Portland*, 385 F.3d at 1241 ("[R]egulations that *may* have the effect of prohibiting the provision of telecommunications services are preempted [by § 253(a)]."); *compare also MetroPCS*, 400 F.3d at 732 (rejecting the argument that "the City's zoning 'criteria,' which allow for [permit] denials based on findings that a given facility is 'not necessary' for the community, are 'impossible for any non-incumbent carrier to meet' and thus constitute an effective prohibition of wireless services"), *with Auburn*, 260 F.3d at 1176 (holding that the city's ordinance is an effective prohibition under § 253(a), in large part because the "city reserves discretion to grant, deny, or revoke the [telecommunications] franchises").

When Congress uses the same text in the same statute, we presume that it intended the same meaning. *See N. Sports, Inc. v. Knupfer (In re Wind N' Wave)*, 509 F.3d 938, 945 (9th Cir. 2007) (applying the presumption); *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991) ("We must presume that words used more than once in the same statute have the same meaning."); *see also Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) (plurality opinion) ("[W]e begin with the premise that when Congress uses the same language in two statutes having similar purposes, particularly when one is

enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes."); *id.* at 261 (O'Connor, J., concurring in the judgment) (stating that the presumption should apply in the absence of "strong evidence" to the contrary). We see nothing suggesting that Congress intended a different meaning of the text "prohibit or have the effect of prohibiting" in the two statutory provisions, enacted at the same time, in the same statute.

Our holding today therefore harmonizes our interpretations of the identical relevant text in §§ 253(a) and 332(c)(7)(B)(i)(II).[2] Under both, a plaintiff must establish either an outright prohibition or an effective prohibition on the provision of telecommunications services; a plaintiff's showing that a locality could *potentially* prohibit the provision of telecommunications services is insufficient.

Because Sprint's suit hinges on the statutory text that we interpreted above—"prohibit or have the effect of prohibiting"—we need not decide whether Sprint's suit falls under § 253 or § 332. As we now hold, the legal standard is the same under either.

B. *The Effective Prohibition Standard Applied to the County of San Diego's Ordinance*

Having established the proper legal standard, we turn to Sprint's facial challenge to the Ordinance. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists

---

[2] We make no comment on what differences, if any, exist between the two statutory sections in other contexts.

under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).[3]

The Ordinance plainly is not an outright ban on wireless facilities. We thus consider whether the Ordinance effectively prohibits the provision of wireless facilities. We have no difficulty concluding that it does not.

The Ordinance imposes a layer of requirements for wireless facilities in addition to the zoning requirements for other structures. On the face of the Ordinance, none of the requirements, individually or in combination, prohibits the construction of sufficient facilities to provide wireless services to the County of San Diego.

Most of Sprint's arguments focus on the discretion reserved to the zoning board. For instance, Sprint complains that the zoning board must consider a number of "malleable and open-ended concepts" such as community character and aesthetics; it may deny or modify applications for "any other relevant impact of the proposed use"; and it may impose almost any condition that it deems appropriate. A certain level of discretion is in-

---

[3] The Supreme Court and this court have called into question the continuing validity of the *Salerno* rule in the context of First Amendment challenges. *See, e.g., Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1190 (2008); *Hotel & Motel Ass'n of Oakland v. City of Oakland*, 344 F.3d 959, 971-72 (9th Cir. 2003). In cases involving federal preemption of a local statute, however, the rule applies with full force. *See Hotel & Motel Ass'n*, 344 F.3d at 971 ("To bring a successful facial challenge outside the context of the First Amendment, 'the challenger must establish that no set of circumstances exists under which the [statute] would be valid.'" (alteration in original) (quoting *Salerno*, 481 U.S. at 745)); *see also Anderson v. Edwards*, 514 U.S. 143, 155 n.6 (1995) (unanimous opinion) (applying *Salerno* to a federal preemption facial challenge to a state statute).

volved in evaluating any application for a zoning permit. It is certainly true that a zoning board *could* exercise its discretion to effectively prohibit the provision of wireless services, but it is equally true (and more likely) that a zoning board would exercise its discretion only to balance the competing goals of an ordinance-the provision of wireless services and other valid public goals such as safety and aesthetics. In any event, Sprint cannot meet its high burden of proving that "no set of circumstances exists under which the [Ordinance] would be valid," *Salerno*, 481 U.S. at 745, simply because the zoning board exercises some discretion.

The same reasoning applies to Sprint's complaint that the Ordinance imposes detailed application requirements and requires public hearings. Although a zoning board could conceivably use these procedural requirements to stall applications and thus effectively prohibit the provision of wireless services, the zoning board equally could use these tools to evaluate fully and promptly the merits of an application. Sprint has pointed to no requirement that, on its face, demonstrates that Sprint is effectively prohibited from providing wireless services. For example, the Ordinance does not impose an excessively long waiting period that would amount to an effective prohibition. Moreover, if a telecommunications provider believes that the zoning board is in fact using its procedural rules to delay unreasonably an application, or its discretionary authority to deny an application unjustifiably, the Act provides an expedited judicial review process in federal or state court. *See* 47 U.S.C. § 332(c)(7)(B)(ii) & (v).

We are equally unpersuaded by Sprint's challenges to the substantive requirements of the Ordinance. Sprint has not identified a single requirement that effec-

tively prohibits it from providing wireless services. On the face of the Ordinance, requiring a certain amount of camouflage, modest setbacks, and maintenance of the facility are reasonable and responsible conditions for the construction of wireless facilities, not an effective prohibition.

That is not to say, of course, that a plaintiff could never succeed in a facial challenge. If an ordinance required, for instance, that all facilities be underground and the plaintiff introduced evidence that, to operate, wireless facilities must be above ground, the ordinance would effectively prohibit it from providing services. Or, if an ordinance mandated that no wireless facilities be located within one mile of a road, a plaintiff could show that, because of the number and location of roads, the rule constituted an effective prohibition. We have held previously that rules effecting a "significant gap" in service coverage could amount to an effective prohibition, *MetroPCS*, 400 F.3d at 731-35, and we have no reason to question that holding today.

In conclusion, the Ordinance does not effectively prohibit Sprint from providing wireless services. Therefore, the Act does not preempt the County's wireless telecommunications ordinance.

C. *Section 1983 claim*

We adopt the reasoning and conclusion of the three-judge panel that 42 U.S.C. § 1983 claims cannot be brought for violations of 47 U.S.C. § 253. *Sprint Telephony*, 490 F.3d at 716-18; *accord Santa Fe*, 380 F.3d at 1266-67; *see also Kay v. City of Rancho Palos Verdes*, 504 F.3d 803, 812-15 (9th Cir. 2007) (holding that § 1983 claims cannot be brought for violations of 47 U.S.C. § 332).

AFFIRMED with respect to the § 1983 claim; otherwise **REVERSED**. Costs on appeal awarded to Defendants-Appellees/Cross-Appellants.

GOULD, Circuit Judge, concurring.

I concur in full in Judge Graber's majority opinion, holding that Section 253(a) preempts any state or local law that actually or effectively prohibits provision of telecommunication services. I write separately to add my view that normally local governments will have the ability to enforce reasonable zoning ordinances that might affect where and how a cellular tower is located, but that will not effectively prohibit cellular telephone service. Zoning ordinances, in my view, will be preempted only if they would substantially interfere with the ability of the carrier to provide such services. Cases of a preempted zoning ordinance will doubtless be few and far between, and the record in this case shows that telecommunication services here were not effectively barred by the zoning ordinance.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 05-56076, 05-56435

SPRINT TELEPHONY PCS, L.P., A DELAWARE LIMITED PARTNERSHIP, PLAINTIFF-APPELLANT-CROSS-APPELLEE, AND PACIFIC BELL WIRELESS LLC, A NEVADA LIMITED LIABILITY COMPANY, D/B/A CINGULAR WIRELESS, PLAINTIFF,

v.

COUNTY OF SAN DIEGO; GREG COX, IN HIS CAPACITY AS SUPERVISOR OF THE COUNTY OF SAN DIEGO; DIANNE JACOB, IN HER CAPACITY AS SUPERVISOR OF THE COUNTY OF SAN DIEGO; PAM SLATER, IN HER CAPACITY AS SUPERVISOR OF THE COUNTY OF SAN DIEGO; RON ROBERTS, IN HIS CAPACITY AS SUPERVISOR OF THE COUNTY OF SAN DIEGO; BILL HORN, IN HIS CAPACITY AS SUPERVISOR OF THE COUNTY OF SAN DIEGO, DEFENDANTS-APPELLEES-CROSS-APPELLANTS.

Filed: March 13, 2007
Amended: June 13, 2007

ORDER

Before MYRON H. BRIGHT,[1] A. WALLACE TASHIMA, and CARLOS T. BEA, Circuit Judges.

The unopposed motion of the National League of Cities and eight other organizations for leave to file an *Amici Curiae* brief is granted, and their *amici* brief in support of the petition for panel rehearing and rehearing *en banc*, received by the Clerk on April 12, 2007, concurrently with the filing of the motion, is ordered filed. The motion of appellee County of San Diego for leave to file reply in support of its petition for rehearing and rehearing *en banc* is denied.

The opinion filed March 13, 2007, and reported at 479 F.3d 1061, is hereby amended. The attached amended opinion is filed concurrently with this order.

With the filing of the amended opinion, the petition for panel rehearing is denied. No further petitions for panel rehearing will be entertained. The full court was advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. *See* Fed. R. App. P. 35(f). The petition for rehearing en banc is denied, without prejudice to a petition for rehearing en banc as to the amended opinion.

AMENDED OPINION

BRIGHT, Circuit Judge:

Sprint Telephony PCS sought an injunction in the district court to prevent San Diego County ("the County") from enforcing its Wireless Telecommunications Facilities zoning ordinance ("WTO"). The district court granted a permanent injunction, agreeing with Sprint that the WTO's regulation of wireless facility

---

[1] The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

placement violated § 253(a) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of U.S.C. Titles 15, 18, & 47) ("TCA"). But, the court held that § 253(a) did not create a private right of action and thus denied Sprint's 42 U.S.C. § 1983 claim for money damages and attorney's fees. *See Sprint Telephony PCS, L.P. v. County of San Diego*, 377 F. Supp. 2d 886 (S.D. Cal. 2005). Sprint appeals the denial of its § 1983 claim, and the County cross-appeals seeking reversal of the order granting the permanent injunction. We conclude that the burdens imposed by the WTO were sufficient to sustain a facial challenge under § 253(a) and that Congress did not intend to permit enforcement of § 253(a) through a § 1983 damages action. We accordingly affirm the district court.

I.

Today's wireless age began when Guglielmo Marconi developed a way for ships to communicate over radio waves in 1895. *See* PETER W. HUBER ET AL., FEDERAL TELECOMMUNICATIONS LAW 10, 861 (2d ed. 1999) (hereinafter "HUBER"). Mobile technology in the United States initially relied on single-cell transmission, which severely limited the number of subscribers who could utilize the system. It was not until December 1947 that Bell Labs scientist D.H. Ring conceptualized cellular telecommunications in an internal technical memorandum. *See 1946: First Mobile Telephone Call, available at* http://www.corp.att.com/attlabs/reputation/timeline/46mobile.html (last visited Mar. 5, 2007). Ring's system employed multiple transmission sites and re-used frequencies, overcoming the limitations of the single-cell transmission system that was constrained by the number of channels available within the radio spectrum first allo-

cated to mobile communications by the Federal Communications Commission ("FCC") in 1949. *See* HUBER at 862 (citing General Mobile Radio Service, *Report and Order of the Commission*, 13 F.C.C. 1190 (1949)). Ring's concept did not, however, replace the single-cell model until the 1980s. *See* HUBER at 864. Before cellular technology took hold, the radio spectrum dedicated to mobile communications supported only 140,000 subscribers. *Id.*

A. The Development of Cellular Technology

Nationwide wireless capacity grew as providers adopted cellular technology and as the FCC gradually expanded the radio spectrum available to mobile telecommunications. *See id.* at 903-08; *see also* FCC, *Cellular Services: Band Plan*, *available at* http://wireless.fcc.gov/services/index.htm?job=service_bandplan&id=cellular (last visited Mar. 5, 2007). In June 1985, when the Cellular Telecommunication Industry Association ("CTIA") began its semi-annual survey of the industry, the CTIA reported 203,600 domestic cellular subscribers. *See* CTIA, *Background on CTIA's Semi-Annual Wireless Industry Survey*, *available at* http://files.ctia.org/pdf/CTIAMidYear2006Survey.pdf (last visited Mar. 5, 2007) ("CTIA Survey"). By June 2006, as we prepared to hear this appeal, that number had grown to 219,420,457. *Id.*

The corresponding infrastructure necessary to support today's cellular technology is extensive. Cellular telecommunications takes its name from the network of hexagonal cells, which "resemble honeycombs," blanketing the coverage area. *See* Jeffrey Berger, *Efficient Wireless Tower Sitting: An Alternative to Section 332(c)(7) of the Telecommunications Act of 1996*, 23 TEMP. ENVTL. L. & TECH. J. 83, 87 (2004). Each cell contains an antenna tower, which emits and receives signals

to and from the subscribers within its geographic area. *Id.* As Ring originally proposed, users are seamlessly passed from tower to tower as they move within the system. *Id.* Approximately 200,000 cellular sites currently support more than 200 million subscribers nationwide. *See CTIA Survey.*

The growing demand for cellular service requires the construction of additional cellular sites, which has met with opposition in some communities. *See* Berger at 86 (describing the opposition to cellular towers). Congress addressed growing concern that the lack of a national wireless policy inhibited growth of the industry in provisions of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6001-03, 107 Stat. 312 (1993). The provisions, in addition to expanding the radio spectrum available to wireless carriers, amended section 332 of the Communications Act of 1934, 47 U.S.C. § 332, to address the "regulatory treatment of mobile services." *See* § 6002, 107 Stat. at 392-95 (codified at 47 U.S.C. § 332(c) (1988 & Supp. V 1993)).

B. The Telecommunications Act of 1996

Congress reaffirmed its commitment to nationwide telecommunications and cellular service when it passed the TCA in 1996. It announced its intent "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." 110 Stat. at 56 (1996). The TCA, which also amended the Communications Act of 1934, in part added a section expressly preempting state and local regulations that have the effect of prohibiting any telecommunications service:

§ 253 Removal of Barriers to Entry

(a) In general

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) State regulatory authority

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) State and local government authority

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) Preemption

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a)

> or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.
>
> (e) Commercial mobile service providers
>
> Nothing in this section shall affect the application of section 332(c)(3) of this title to commercial mobile service providers.

§ 101, 110 Stat. at 70-71 (codified at 47 U.S.C. § 253(a)-(e) (1994 & Supp. II 1996)) (hereinafter "removing barriers"). Congress, by preempting state and local statutes, "ended the States' longstanding practice of granting and maintaining local exchange monopolies." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 405 (1999) (Thomas, J., concurring in part, dissenting in part); *see also Cablevision of Boston, Inc. v. Pub. Improvement Comm'n of Boston*, 184 F.3d 88, 97-98 (1st Cir. 1999) (explaining that § 253 implements Congress's "free market vision" by preventing states and localities from maintaining the "monopoly status of certain providers, on the belief that a single regulated provider would provide better or more universal service," *id.* at 98).

In addition to § 253(a), which protects all common carriers, the TCA amended the code provisions applicable to only mobile services. *See* 47 U.S.C. § 332(c) (1994 & Supp. II 1996). Prior to passage of the TCA, § 332 included, among other provisions, the factors the FCC must consider as it manages the electromagnetic spectrum assigned to private mobile services. *See id.* § 332(a) (1994). Section 332 also required commercial mobile service providers to be treated as common carriers (subject to limited exceptions that the FCC may establish). *See*

id. § 332(c) (1994). The TCA, though, added subsection (c)(7), which expressly preserves the authority of local governments to make decisions, subject to certain limitations, regarding the placement of wireless service facilities:

> (7) Preservation of local zoning authority
>
> (A) General authority
>
> Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.
>
> (B) Limitations
>
> (i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—
>
> (I) shall not unreasonably discriminate among providers of functionally equivalent services; and
>
> (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.
>
> (ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instru-

mentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

§ 704, 110 Stat. at 151-52 (codified at 47 U.S.C. § 332(c)(7) (1994 & Supp. II 1996)) (hereinafter "preserving local zoning authority").

The addition of § 332(c)(7) represented a conscious choice by the House and Senate conferees to maintain limited state and local control over the placement of wireless facilities. *See Omnipoint Corp. v. Zoning Hearing Bd.*, 181 F.3d 403, 406-07 (3d Cir. 1999); *Town of Amherst v. Omnipoint Communications Enters., Inc.*, 173 F.3d 9, 13 (1st Cir. 1999). The House, concerned that "siting and zoning decisions by non-federal units of government[ ] have created an inconsistent and, at times, conflicting patchwork of requirements which will inhibit the deployment of Personal Communications Services as well as the rebuilding of a digital technology-based cellular telecommunications network," would have required the FCC to regulate directly the placement of wireless facilities. H.R. Rep. No. 104-204(I), at 94 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 61. The conferees, however, created § 332(c)(7) in an effort to "prevent[ ] Commission preemption of local and State land use decisions and preserve[ ] the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth in the 7175 conference agreement." H.R. Conf. Rep. No. 104-458, at 207-08 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 222.

C. The County's Enactment of the Wireless Telecommunications Facilities Ordinance

Against the backdrop of the TCA, the County, in April 2003, enacted Ordinance Number 9549, "An Ordinance Amending the San Diego Zoning Ordinance Relating to Wireless Telecommunications Facilities." The WTO supplements the County's general zoning ordinance (hereinafter "Zoning Ordinance") and creates a four-tier system for the granting of wireless facility permits. According to the WTO a provider, such as Sprint, must obtain one of four conditional use permits

before constructing a wireless facility: (1) Administrative Site Plan Permit; (2) Site Plan with Community Review Permit; (3) Minor Use Permit; or (4) Major Use Permit. WTO § 6985. Each class of permit defines the wireless facility projects that fall within its scope, based on factors including the placement, visibility, and height of the proposed structure. *Id.*

We briefly summarize the permit application requirements of the WTO. A permit applicant must: (1) identify the geographic area served by the site, list all of the applicant's other sites in the area, and describe why the site is necessary to the applicant's network; (2) submit a "visual impact analysis" that describes the "maximum silhouette, viewshed analysis, color and finish palette and proposed screening," and includes simulated photographs of the site; and (3) create a narrative detailing the site's height, maintenance, noise emissions, alternative placement in a preferred site (if the site does not fall within one of the geographic areas preferred by the County for wireless facilities), landscaping plan, fire service plan, hazardous materials use, maintenance personnel parking plan (if the site is located in a public right of way), "a letter stating the applicant's willingness to allow other carriers to co-locate on their facilities whenever technically and economically feasible and aesthetically desirable," and the "lease area of the proposed facility on the plot plan." *See* WTO §§ 6984, 6986(B). The WTO also discusses the general and design regulations applicable to wireless facilities, so that an applicant may design a compliant facility. *See* WTO §§ 6985(C), 6987.

In addition to the provisions of the WTO, wireless providers that apply for use permits are subject to other requirements contained in the Zoning Ordinance. The Zoning Ordinance requires applicants to submit: (1) a

list of "all persons having a interest in the application as well as the names of all persons having any ownership interest in the property involved;" (2) complete plans for the site; and (3) an "appropriate environmental impact review document." *See* Zoning Ordinance § 7345(b).

Following submission of an application, the review process, established by the Zoning Ordinance and the provisions added by the WTO, reserves to the County's permitting authority significant discretion. Before a use permit is granted, the authority must find that "the location, size, design, and operating characteristics of the proposed use will be compatible with adjacent uses, residences, or structures." Zoning Ordinance § 7358(a). The Zoning Ordinance lists items of "consideration," but leaves the authority to consider "any other relevant impact of the proposed use." *Id.* § 7358(a)(6). Additionally, the WTO requires that the decision maker must determine that the proposed facility is appropriately "camouflaged," "consistent with community character," and designed to have minimum "visual impact." *See* WTO §§ 6985, 6987. Finally, the Zoning Ordinance, *inter alia*, allows the County's permitting authority to impose conditions on the use consistent with the objectives of the Zoning Ordinance, *id.* § 7362; to permit seemingly open-ended public hearings, *id.* § 7356 (hearing before grant or denial of use permit), § 7366(h) (hearing on appeal from grant or denial of use permit); and to order revocation or modification of a use permit following a violation, *id.* § 7382(a)(2). The ordinance also observes that it is a misdemeanor or infraction to violate a use permit's conditions. *Id.* § 7703.

II.

Sprint and its co-plaintiff in the district court, Pacific Bell Wireless, LLC, dba Cingular Wireless, brought a

prima facie challenge to the WTO, arguing that it was preempted by § 253(a) (removing barriers).[2] Sprint suggested that the "onerous" permitting structure of the WTO, and the discretion retained by the County, prevented it from providing wireless service. Sprint also argued that the four-tier permitting system imposed by the WTO added an additional tier that was not generally applicable to all telecommunications providers, and thus the ordinance discriminated against wireless telecommunications providers in violation of § 253(c) (addressing state and local authority to manage the public rights-of-way) and the Fourteenth Amendment to the Constitution. In addition to a permanent injunction against the enforcement of the WTO, Sprint sought § 1983 money damages and attorney's fees. The County, however, argued that § 253(a) was inapplicable to zoning ordinances which regulate wireless providers. Rather, the County suggested that § 332(c)(7) (preserving local zoning authority) governed the ability of local governments to regulate wireless facility placement and construction, and that Congress provided in § 332(c)(7) the exclusive mechanism to challenge zoning decisions.

The district court first addressed the applicability of § 253(a) when it considered the County's motion under Federal Rule of Civil Procedure 12(b)(6) to dismiss. The court held that the plain language of § 253(a) permitted a facial challenge to a local ordinance, while § 332(c)(7) governed challenges to individual facility placement decisions. Nevertheless, Sprint's § 253(c) and Fourteenth

---

[2] The district court dismissed with prejudice the claims of Pacific Bell Wireless on February 8, 2005, pursuant to a stipulation of dismissal filed by the parties.

Amendment equal protection claims failed, according to the court, because § 253(c) is a safe-harbor provision that does not give rise to a separate cause of action. Sprint also failed to meet its burden of refuting the rational basis for the WTO's allegedly discriminatory classification, which the court reasoned was its obligation in order to bring a Fourteenth Amendment claim. Finally, the court permitted Sprint's § 1983 claim to proceed because the County only challenged in its Rule 12(b)(6) motion the applicability of § 253(a).

The County next filed a Federal Rule of Civil Procedure 12(c) motion for judgment on the pleadings. It argued that § 253(a) did not create a private right of action, and thus Sprint could not employ the statute to seek an injunction or § 1983 damages and fees. The County also argued that the members of its Board of Supervisors, named by Sprint as defendants in their individual capacities, were absolutely immune from damages under § 1983. The district court, applying the factors described in *Cort v. Ash*, 422 U.S. 66, 78 (1975), determined that Congress "impliedly created a private right of action under § 253(a)." The court next recognized the presumption in favor of enforcing federal rights under § 1983 and determined that the TCA did not foreclose the remedy. Finally, the court agreed that the County of San Diego Supervisors were immune from damages in their capacity as legislators and dismissed them from the suit.

Sprint and the County filed motions for summary judgment. Sprint argued that, as a matter of law, the WTO violated § 253(a) and therefore the court should enjoin enforcement of the ordinance and award damages and fees under § 1983. The County, *inter alia*, reasserted its argument that § 332(c)(7) was the provision of the TCA applicable to the placement of wireless tele-

communications facilities and thus Sprint could not bring a claim under § 253(a). The court granted Sprint's request for a permanent injunction, but vacated its earlier ruling that § 253(a) could support a claim for § 1983 damages.[3]

III.

In general we review a summary judgment order granting a permanent injunction for abuse of discretion. *Washington State Republican Party v. Wash.*, 460 F.3d 1108, 1115 (9th Cir. 2006). "However, 'any determination underlying the grant of an injunction [is reviewed] by the standard that applies to that determination.' " *Id.* (quoting *Ting v. AT&T*, 319 F.3d 1126, 1134-35 (9th Cir. 2003)). Thus, we review the district court's findings of fact for clear error and its determinations of law-including the determination that a local statute is preempted by federal law-*de novo*. *See Ting*, 319 F.3d at 1135; *see also Olympic Pipe Line Co. v. City of Seattle*, 437 F.3d 872, 877 & n. 12 (9th Cir. 2006); *Qwest Communications Inc. v. City of Berkeley*, 433 F.3d 1253, 1256 (9th Cir. 2006) (hereinafter "*Berkeley*") (reviewing *de novo* district court's decision that § 253 preempted local right-of-way use ordinance).

IV.

This appeal presents three related questions of law. The threshold question is whether Sprint may seek a

---

[3] This case was originally assigned to the District Judge Judith Keep, who ruled on the County's motions to dismiss the case and for judgment on the pleadings. Following Judge Keep's death on September 14, 2004, the case was reassigned to District Judge Barry Ted Moskowitz, who ruled on the parties' motions for summary judgment.

permanent injunction against the enforcement of the WTO under § 253(a) (removing barriers). The second question is whether the WTO violates § 253(a) as a matter of law. *See, e.g., United States v. Bynum*, 327 F.3d 986, 990 (9th Cir. 2003) ("[A] facial challenge to the constitutionality of a statute is a question of law"), *see also United States v. Salerno*, 481 U.S. 739 (1987). The final question is whether Sprint may recover money damages and fees arising from a violation of § 253(a) under § 1983.

A. The Availability of Injunctive Relief

The County first challenges the applicability of § 253(a) (removing barriers) to local zoning ordinances, a matter of first impression in this circuit. We must determine whether, as a matter of law, § 253(a) may preempt a wireless facilities zoning ordinance. The County concedes that § 253(a), which covers all common carriers, is generally applicable to wireless providers, but argues that § 332(c)(7) (preserving local zoning authority) should govern challenges regarding the placement and construction of wireless facilities.

1. Sprint's Ability to Seek Injunctive Relief

As a threshold matter, we must consider whether Sprint has standing to challenge the WTO under § 253(a). The County, in filings before the district court, conceded the availability of injunctive relief under the Supremacy Clause if the WTO was within the preemptive scope of § 253(a). *See* U.S. Const. art. VI, § 2. We nevertheless pause to consider the district court's jurisdiction. *See Juidice v. Vail*, 430 U.S. 327, 331 (1977) (court must consider standing of party under Article III despite failure of parties to raise the issue).

We acknowledged in *City of Auburn v. Qwest Corporation* that the Supremacy Clause permits the TCA to

preempt state and local statutes and regulations, though the court did not squarely address Qwest's standing. *See City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1175 (9th Cir. 2001) (hereinafter "*Auburn*") (observing that Supremacy Clause permits § 253(a) to expressly preempt local laws). *See also Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712-13 (1985) (discussing preemption under the Supremacy Clause); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983) ("A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve."); *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 16 (1st Cir. 2006) (declining to reach whether § 253(a) creates a private right because injunctive relief sought under Supremacy Clause); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1264 (10th Cir. 2004) (hereinafter "*Santa Fe*") (applying *Shaw* to find Qwest's § 253(a) preemption claim federally justiciable under the Supremacy Clause); *N.J. Payphone Ass'n, Inc. v. Town of West New York*, 299 F.3d 235, 241-42 (3d Cir. 2002) (basing § 253 preemption on Supremacy Clause).

The Sixth Circuit has expressed concern that standing under the Supremacy Clause is inappropriate, absent a private statutory right of action. *See TCG Detroit v. City of Dearborn*, 206 F.3d 618, 622 n.1 (6th Cir. 2000). The *TCG Detroit* court declined to approve a case in the District Court for the Western District of Texas that, like *Auburn* and the district court in this case, proceeded under the Supremacy Clause despite finding a lack of a private right under the TCA. *See AT&T Communications v. City of Austin*, 975 F. Supp. 928, 936 (W.D. Tex.

1997), *vacated as moot by,* 235 F.3d 241 (5th Cir. 2000). The Sixth Circuit did not disclose the precise source of its discomfort, but a footnote raised the concern that § 253(d) might vest in the FCC exclusive or primary jurisdiction to preempt state and local regulations. Nevertheless, we will not disturb our approach in *Auburn* because we conclude that the availability of injunctive relief is appropriate under *Shaw. See Santa Fe,* 380 F.3d at 1264.

2. The Applicability of § 253(a) to Zoning Ordinances Regulating Wireless Telecommunications Facilities

The District Court twice held that § 253(a) may be employed to assert a facial challenge to a wireless facilities zoning ordinance. Both times the court reasoned that, on the face of the TCA, § 253(a) addresses "State or local statute[s] or regulation[s]" and § 332(c)(7) "decisions regarding the placement, construction, and modification" of facilities. Thus, while § 332(c)(7) may be used to challenge individual zoning decisions, the court held that § 253(a) is a proper vehicle to challenge an entire wireless facilities zoning ordinance.

a. The Distinction Between § 253(a) and § 332(c)(7)

The distinction between the application of § 253(a) (removing barriers) and § 332(c)(7) (preserving local zoning authority), for purposes of this case, is significant. Both § 253(a) and § 332(c)(7)(B)(i)(II) employ similar language to limit states or localities from prohibiting or effectively prohibiting personal wireless service, the limitation upon which Sprint relies. *Compare* 47 U.S.C. § 253(a) ("No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to

provide any interstate or intrastate telecommunications service.") *with id.* § 332(c)(7)(B)(i) ("The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof .... (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services."). Section 332(c)(7), however, further requires:

> Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction.

Id. § 332(c)(7)(B)(v).[4] Moreover, the Supreme Court has already held that claims brought under § 332(c)(7) do not support § 1983 damages or fees. *See City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 127 (2005) (holding that "[e]nforcement of § 332(c)(7) through § 1983 would

---

[4] In addition to establishing a period of limitations for a claim, § 332(c)(7)(B) contains three substantive limitations on state or local decisions regarding the placement of wireless facilities. The decision may not "unreasonably discriminate among providers of functionally equivalent services;" "prohibit or have the effect of prohibiting the provision of wireless services;" or be based on "the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions." 47 U.S.C. § 332(c)(7)(B)(i)(I), (B)(i)(II) & (B)(iv). The section also contains three procedural limitations. The decision regarding placement must be in writing, supported by substantial evidence, and reached "within a reasonable period of time." *Id.* § 332(c)(7)(B)(ii) & (iii). *See U.S. Cellular Tel. of Greater Tulsa L.L.C. v. City of Broken Arrow*, 340 F.3d 1122, 1132-33 (10th Cir. 2003).

distort the scheme of expedited judicial review and limited remedies created by § 332(c)(7)(B)(v)"). Thus, it could be argued that the period of limitations and certain unavailability of § 1983 damages make § 332(c)(7) a comparatively unattractive vehicle to pursue a facial challenge to a wireless facilities zoning ordinance.

b. The Novel Application of § 253(a)

The use of § 253(a) (removing barriers) to preempt an entire wireless facilities zoning ordinance is a new and different application of the TCA. Courts have frequently inquired whether an individual zoning decision is contrary to § 332(c)(7)(B) (preserving local zoning authority). *See, e.g., Omnipoint Communications, Inc. v. City of White Plains*, 430 F.3d 529, 535 (2d Cir. 2005) (applying § 332(c)(7)(B)(i)(II) to determine whether planning board must grant application to construct wireless tower); *MetroPCS, Inc. v. City & County of San Francisco*, 400 F.3d 715, 730-31 (9th Cir. 2005) ("*MetroPCS*") (applying § 332(c)(7)(B)(i)(II) to determine whether denial of conditional use permit imposed a "general ban" on new wireless service providers); *USCOC of Virginia RSA # 3 v. Montgomery County Bd. of Supervisors*, 343 F.3d 262, 267-68 (4th Cir. 2003) (applying § 332(c)(7)(B)(i)(II) to determine whether denial of application to construct wireless telecommunication tower had the effect of prohibiting service); *VoiceStream Minneapolis, Inc. v. St. Croix County*, 342 F.3d 818, 833 (7th Cir. 2003) (applying § 332(c)(7)(B)(i)(II) to challenge regarding individual zoning decision). *Cf. Abrams*, 544 U.S. at 120-21 (assuming, *arguendo*, that § 332 creates individually enforceable rights but holding § 1983 damages not available). But, facial challenges to wireless facilities zoning ordinances are rare. *But cf. Nextel Partners Inc. v. Kingston Township*, 286 F.3d 687, 693 (3d Cir. 2002)

(finding facial challenge to wireless facilities zoning ordinance brought under § 332(c)(7)(B)(i) moot because of intervening change in ordinance).

The lack of cases challenging zoning ordinances is unsurprising because of the high burden faced by a party asserting a facial challenge. *See Salerno,* 481 U.S. at 745 ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."). Indeed, we have observed that it may be particularly difficult to mount a facial challenge against a zoning ordinance:

> Zoning rules—such as those that allow local authorities to reject an application based on "necessity"—may not suggest on their face that they will lead to discrimination between providers or have the effect of prohibiting wireless services. Thus, in most cases, only when a locality applies the regulation to a particular permit application and reaches a decision—which it supports with substantial evidence—can a court determine whether the TCA has been violated.

MetroPCS, 400 F.3d at 724.

c. Statutory Interpretation of the TCA

To decide whether § 253(a) (removing barriers) may be used to invalidate a local wireless facilities zoning ordinance we first examine the plain language of the statute. *See United States v. Ron Pair Enters.,* 489 U.S. 235, 241 (1989); *Clark v. Capital Credit & Collection Servs., Inc.,* 460 F.3d 1162, 1168-69 (9th Cir. 2006). Courts are not, however, "bound by the plain meaning of a statute where its literal application will produce a re-

sult demonstrably at odds with the intention of its drafters." *Clark*, 460 F.3d at 1169 (quotation marks and citation omitted). Legislative history may inform the interpretation of a statute's plain language "when there is clearly expressed legislative intention contrary to that language, which would require us to question the strong presumption that Congress expresses its intent through the language it chooses." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 433 n.12 (1987) (quotation marks and citation omitted). When a statute's meaning is plain, a court may nevertheless avoid "a result contrary to the statute's purpose or lead to unreasonable results." *United States v. Combs*, 379 F.3d 564, 569 (9th Cir. 2004); *see also United States v. Bahe*, 201 F.3d 1124, 1133-34 (9th Cir. 2000) (examining legislative history).

Here, the County argues that § 332(c)(7) (preserving local zoning authority) specifically maintains local authority to decide where and how wireless facilities are constructed and contains a procedure for challenging those decisions. Congress, therefore, must have intended, according to the County, any challenge to a wireless facilities zoning ordinance to proceed under that section rather than the more expansive § 253(a), which is not limited to issues regarding wireless facility placement. Any other reading would render the reservation of local authority described in § 332(c)(7) moot. The County also relies on the House and Senate conferees understanding of § 332(c)(7), reported in the House Conference Report accompanying the TCA:

> The conference agreement creates a new section 704 [U.S. Code § 332(c)(7)] which prevents Commission preemption of local and State land use decisions and preserves the authority of State and local governments over

> zoning and land use matters except in the limited circumstances set forth in the conference agreement.

H.R. Conf. Rep. No. 104-458, at 207-08 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 222.

i. Plain Meaning of the TCA

The County's insistence that any challenge to a local zoning ordinance be lodged under § 332(c)(7)(B)(i)(II) ignores the plain meaning and structure of the TCA. Section 253(a) (removing barriers) is located in Chapter 5, "Wire or Radio Communications," of United States Code Title 47. We have recognized the "preemptive language [of § 253(a)] to be clear and 'virtually absolute' in restricting municipalities to a 'very limited and proscribed role in the regulation of telecommunications.' " *Berkeley*, 433 F.3d at 1256 (citation omitted). Section 253 protects all common carriers, and applies to "commercial mobile service" providers unless FCC rulemaking suspends application of the section. *See* 47 U.S.C. § 332(c)(1)(A). The FCC has not exempted mobile service providers from the protections of § 253; to the contrary, FCC decisions apply § 253 to claims that a state or local statute regulating wireless service providers violates the substantive provisions of the TCA.[5] *See, e.g., In*

---

[5] We have not located an FCC decision directly addressing the applicability of § 253 to zoning ordinances—rather than other state and local ordinances such as those regulating franchising-governing wireless providers. The FCC tentatively expressed the opinion that it could invalidate a zoning ordinance under § 253. *See In re Cellular Telecomm. Indus. Ass'n*, 12 F.C.C.R. 11795, 11797 (1997) (request for comment on supplemental pleading cycle). In that administrative proceeding, the CTIA challenged a moratorium on the construction of telecommunications facilities. The FCC invited comment regarding its tentative conclusion that,

re Pittencrieff Communications, Inc., 13 F.C.C.R. 1735 (1997), *aff'd sub nom. Cellular Telecomm. Indus. Ass'n v. FCC*, 168 F.3d 1332 (D.C. Cir. 1999). Thus, § 253(a) applies on its face to local ordinances that have the effect of prohibiting wireless service.

Nevertheless, the County contends that applying § 253(a) would frustrate the purpose of § 332(c)(7) (preserving local zoning authority). In *Abrams* the Supreme Court observed that § 332(c)(7) "imposes specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of such facilities." 544 U.S. at 115. In that case the Court assumed, *arguendo*, that § 332(c)(7) created "individually enforceable rights," which could be the basis for seeking injunctive relief through the private right of action created by § 332(c)(7)(B)(v). *Id.* at 120, 127. The Court went on to determine that the "expedited judicial review and limited remedies created by § 332(c)(7)(B)(v)" foreclosed enforcement of § 332(c)(7)'s limitations through § 1983. *Id.* at 127.

In the present litigation, however, we are asked to examine the general provisions of § 253(a) rather than

---

> Section 332(c)(7)(B)(v) does not, however, limit our authority to review local facility siting moratoria which may constitute entry barriers under Sections 253(d) or entry regulations under 332(c)(3).

Id. at 11796. The CTIA, however, withdrew its petition for review before the FCC issued a final order expressing its opinion on the applicability of § 253. *See In re Cellular Telecomm. Indus. Ass'n*, 14 F.C.C.R. 9174 (1999). In a separate proceeding, the FCC examined whether a local ordinance limiting the placement of payphones on private land violated § 253(a), and determined that it did not. *See In re Cal. Payphone Ass'n*, 12 F.C.C.R. 14191 (1997).

the specific limitations of § 332(c)(7). Sprint does not resort to the substantive or procedural limitations that are unique to § 332(c)(7). Rather, the company seeks enforcement of a preemption that is common to both § 253(a) and § 332(c)(7)(B)(i)(II). Thus, we find the distinction that the County draws illusory. Section 253(a) lacks the period of limitations created by § 332(c)(7)(B)(v), but it also lacks the specific limitations that give an individual greater latitude to challenge a zoning decision under § 332(c)(7). The choice to pursue a prima facie challenge under § 253(a) or an individual challenge under § 332(c)(7) is real, but that choice does not imply that one section must undermine the other.

Interpreting § 253(a) to preempt certain local wireless zoning ordinances does not negate the substantive and procedural elements of § 332(c)(7). *See Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991) (courts must make "every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous"). Section 332(c)(7) prescribes a "restrictive private remedy" for individuals seeking "[j]udicial review of zoning decisions." *See Abrams*, 544 U.S. at 121, 122. The procedure for judicial review allows individuals to challenge "any final action or failure to act by a State or local government or any instrumentality thereof[.]" 47 U.S.C. § 332(c)(7)(B)(v). A judicial proceeding must be brought within thirty days of the state's or locality's action or failure to act. *Id.*

The County argues that permitting a facial challenge to an entire ordinance under § 253(a) would create a "giant loophole" in § 332(c)(7). But, that argument ignores § 332(c)(7)'s preferential treatment of challenges to individual zoning decisions and the additional limitations and

requirements that § 332(c)(7) places on zoning authorities. A zoning decision might be challenged because it does not comply with the procedural requirements of § 332(c)(7). *See id.* § 332(c)(7)(B)(ii) & (iii) (decision must be in writing, supported by substantial evidence, and reached "within a reasonable period of time."). The decision might also violate the substantive provisions of the section. *See id.* § 332 (c)(7)(B)(i)(I), (II) & (iv) (decision may not unreasonably discriminate among providers, prohibit or have the effect of prohibiting service, or be based on radio emission levels that are acceptable to the FCC). Section 253, by contrast, states only that a statute or regulation may not prohibit or have the effect of prohibiting service. *See id.* § 253(a). The substance of the sections is therefore different and, even though § 253(a) does not place a thirty-day period of limitation on facial challenges, § 332(c)(7)'s period of limitation for challenges to individual zoning decisions would be left intact. *Cf. Abrams*, 544 U.S. at 126 ("[c]onstruing § 332(c)(7) . . . to create rights that may be enforced *only* through the statute's express remedy" (emphasis added)). Ultimately, the difficulty of raising a facial challenge to a zoning regulation, *see MetroPCS*, 400 F.3d at 724, would likely prevent the scenario that the County suggests; wireless providers could not simply avoid § 332(c)(7)'s period of limitation by styling their challenges to individual zoning decisions as facial challenges under § 253(a).[6] Rather, § 332(c)(7) would continue to offer a more expedient, and extensive, basis for review.

---

[6] The County also argues that we have established a "more lenient standard" for successful facial challenges under § 253(a) than under § 332(c)(7)(B)(i), relying on a supposed conflict between dicta in *MetroPCS*, 400 F.3d at 724, 725 n.3, 727 (alluding to the difficulty under § 332(c)(7)(B) of bringing facial challenge based on a *single zoning decision*) and *Auburn*, 260 F.3d at 1175 (discussing under

Additionally, other provisions contained in § 253 suggest that Congress did not perceive a contradiction between § 253(a) and § 332(c)(7). Congress expressly recognized the potential of § 253(a) to interfere with other provisions of § 332. Section 253(e) exempts from preemption § 332(c)(3) (addressing limited state regulation of wireless service rates). *See* 47 U.S.C. § 253(e). Congress also excluded from § 253(a)'s preemptive scope state and local regulations requiring "fair and reasonable" compensation for the use of public rights-of-way and requiring telecommunications providers to serve rural areas. *See id.* § 253(c), (f). Had Congress harbored a similar concern that § 253(a) could negate the protections allegedly extended by § 332(c)(7) it could have included a similar exemption, but it did not do so. Because this series of exclusions demonstrates Congress's awareness that § 253 could affect § 332, and because the existing exclusions address traditionally local provinces like the management of rights-of-way, we interpret—*expressio unius est exclusio alterius*—Congress's failure to omit § 332(c)(7) from the reach of § 253(a) as an affirmation of § 253(a)'s applicability to state and local wireless zoning ordinances.[7] *See Clark*, 460 F.3d at 1169;

---

§ 253(a) a facial challenge to a franchise *regulation*). Though we conclude here that Sprint's challenge to the WTO meets the criterion described in *Auburn* for challenging an ordinance, we reject the argument that we have lowered the threshold suggested by *MetroPCS* for a successful facial challenge predicated on a zoning decision.

[7] "The expression of one is the exclusion of another." The Supreme Court has recently reminded courts of the limits of this canon of statutory interpretation. It cautioned that the canon "does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *See Barnhart v. Peabody Coal*

Austein v. Schwartz (*In re Gerwer*), 898 F.2d 730, 732 (9th Cir. 1990) ("The express enumeration indicates that other exceptions should not be implied.").

ii. Legislative History of the TCA

Because the plain language of § 253(a) (removing barriers) permits facial challenges to zoning ordinances, we need only examine the legislative history of the TCA to confirm that the language is not "demonstrably at odds with the intention of its drafters." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). We conclude that the legislative history of the TCA does not indicate that Congress intended a result contrary to the plain reading of the statute.

Relying on the House Conference Report accompanying the TCA, we have recognized that, "one of the primary purposes of section 332(c)(7) is to protect the legitimate traditional zoning prerogatives of local governments." *MetroPCS*, 400 F.3d at 727 n.5. The conferees inserted § 332(c)(7) (preserving local zoning authority) to rebuff a House provision that "would have given authority to the FCC to regulate directly the siting of wireless communications towers" and thus completely preempt local zoning decisions. *See St. Croix*, 342 F.3d at 828-29.

Co., 537 U.S. 149, 168 (2003) (citation omitted). Here, although Sprint does not make direct reference to the canon, it argues that we should interpret Congress's failure to exclude § 332(c)(3) from § 253(a)'s preemptive scope as evidence that Congress intended the two sections to be enforced together. Though one exclusion is alone insufficient to apply the canon, *see Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81 (2002), the series of exclusions contained in § 253 represents a sufficient basis to determine that Congress considered, but rejected, excluding § 332(c)(7) from the scope of § 253(a).

There is no indication, however, that Congress feared § 253(a)'s preemption language would endanger local zoning ordinances it intended to permit under § 332(c)(7). Indeed, both § 253(a) and § 332(c)(7)(B)(i)(II) proscribe substantively the same local regulations: those that prohibit or have the effect of prohibiting personal wireless service. The Conference Report explains, in the context of § 332(c)(7), that "[i]t is the intent of this section that bans or policies that have the effect of banning personal wireless services or facilities not be allowed and that decisions be made on a case-by-case basis." *See* H.R. Conf. Rep. No. 104-458, at 208, 1996 U.S.C.C.A.N. at 222. The similar language of the sections and the Conference Report demonstrates that § 253(a) is consistent with the substantive provision of § 332(c)(7)(B)(i)(II).

For purposes of this appeal, the principal distinction between the two sections is § 332(c)(7)(B)(v)'s thirty-day period of limitations. The Conference Report does not explain the intent of the limitation, though it is generally consistent with the conferee's requirement that the court selected by the individual challenging the zoning decision "act expeditiously in deciding such cases." *See* H.R. Conf. Rep. No. 104-458, at 209, 1996 U.S.C.C.A.N. at 223. We have, however, found no legislative history that suggests Congress intended to limit facial challenges to the thirty-day period following some event, whether the passage of the state or local regulation challenged or a particular zoning decision applying a state or local regulation.

Thus, the legislative history of § 253 and § 332(c)(7) does not undermine our plain reading of the sections. We need not examine the legislative history further.

B. Preemption of the WTO

We next consider whether the WTO is preempted by the TCA. The County argues that the additional requirements imposed by the WTO are consistent with general zoning principles and fall short of the conditions that caused our court to preempt the City of Auburn's franchise ordinance. *See Auburn*, 260 F.3d at 1176. Sprint contends that the WTO is an "onerous" system of requirements that shares many of the restrictions that amounted to an effective prohibition on wireless service in *Auburn*. Sprint also argues that the WTO is not "competitively neutral" because it regulates wireless providers in a manner not applicable to all utility providers and likens the degree of regulation to that "usually reserved for landfills, cemeteries and power plants," not utilities.

The district court gleaned a set of concerns from cases discussing preemption of local ordinances under § 253(a). *See Auburn*, 260 F.3d at 1176 (invalidating local franchising ordinance); *Santa Fe*, 380 F.3d 1258 (preempting right-of-way ordinance that, *inter alia*, increased rent, imposed costly new equipment requirement, and permitted unfettered discretion); *Cox Communications PCS, L.P. v. City of San Marcos*, 204 F.Supp.2d 1260 (S.D. Cal. 2002) (considering whether regulations requiring conditional use permit to install facilities in public right-of-way violated § 253(a)); *Qwest Comm. Corp. v. City of Berkeley*, 146 F. Supp. 2d 1081 (N.D. Cal. 2001) (considering whether public right-of-way ordinance violated § 253(a)). Informed by those opinions, the district court focused on the WTO's application submission requirements, the discretion reserved to the zoning authority, the public hearing requirements, and the criminal penalties for violation of a use permit.

The court concluded that the combination of these factors had the effect of prohibiting wireless service in a matter similar to the impermissible franchising ordinance in *Auburn*.

In *Auburn* we identified the factors considered by the district court in this case. *See Auburn*, 260 F.3d at 1175-76. Our concerns here are almost identical. The County's WTO, on its face, supplements the Zoning Ordinance by adding submission requirements to an already voluminous list. *See* WTO § 6984. Those requirements are in addition to the open-ended discretion and threat of criminal penalties contained in the Zoning Ordinance. The WTO itself explicitly allows the decision maker to determine whether a facility is appropriately "camouflaged," "consistent with community character," and designed to have minimum "visual impact." *See* WTO §§ 6985, 6987. We find the County's retort—that the elements of the WTO challenged by Sprint are traditional facets of zoning that are unobjectionable for the simple reason that the WTO is a zoning ordinance rather than a franchise or public right-of-way ordinance—unconvincing. Though *Auburn* discussed a franchise ordinance, our concerns in this case are largely the same. We conclude that the WTO imposes a permitting structure and design requirements that presents barriers to wireless telecommunications within the County, and is therefore preempted by § 253(a).

C. Section 1983 damages and fees

Finally, we consider the availability of § 1983 damages and fees. The district court, reversing its earlier holding, determined that § 253(a) (removing barriers) does not create a private right enforceable through § 1983. The court's holding is consistent with the Tenth Circuit's position, *Santa Fe*, 380 F.3d at 1266-67 (§ 253(a)

does not create a private right), but presents a question of first impression in our circuit. *Cf. Bell South Telecomm., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1191 (11th Cir. 2001) (interpreting § 253 to create an implied private right of action when the challenged regulation concerns the use of public rights-of-way, implicating § 253(c)'s safe-harbor); *TCG Detroit*, 206 F.3d at 624 (same). No other circuit court has reached the issue. The district courts in this circuit have overwhelmingly concluded that § 253(a) neither creates a right enforceable under § 1983, nor implies a separate private right of action.[8] *See Pacific Bell Tel. Co. v. City of Walnut Creek*, 428 F. Supp. 2d 1037, 1054 (N.D. Cal. 2006) (finding that § 253(a) creates no private right enforceable under § 1983); *Qwest Communications Corp. v. City of Berkeley*, 202 F. Supp. 2d 1085, 1090-96 (N.D. Cal. 2001) (finding no implied private right of action under § 253(a) or § 253(c)); *Pacific Bell Tel. Co. v. City of Hawthorne*, 188 F. Supp. 2d 1169, 1172-75 (C.D. Cal. 2001) (finding

---

[8] The question in this case, of whether § 253(a) creates a right enforceable under § 1983, overlaps with but is distinct from the question of whether the statute implies a separate cause of action. As we have earlier explained, "The main difference between an implied cause of action and a right enforceable under Section 1983 turns on the source of the remedy. A plaintiff invoking an implied right of action must demonstrate that Congress intended to create not only a private right but also a private remedy. In contrast, once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983, and the plaintiff need not show any further congressional intent to create a remedy." *Price v. City of Stockton*, 390 F.3d 1105, 1109 n.3 (9th Cir. 2004) (citations and quotation marks omitted). The test in *Cort v. Ash*, 422 U.S. 66 (1975), discussed by the district court, is used to determine whether a statute implies a private right of action, but not for determining whether a statute creates a right enforceable under § 1983.

§ 253(c) creates an implied private right of action but that § 253(a) and (b) do not).

Section 1983 "by itself does not protect anyone against anything," *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979), and thus the question for us is whether § 253(a) independently confers a right on Sprint. Our inquiry differs from the question of whether Sprint may seek enforcement of § 253(a) by bringing its preemption action under the Supremacy Clause of the Constitution. *See Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106-08 (1989) ("Given the variety of situations in which preemption claims may be asserted, in state court and in federal court, it would obviously be incorrect to assume that a federal right of action pursuant to § 1983 exists every time a federal rule of law pre-empts state regulatory authority." *Id.* at 107-08). Here, three requirements guide our inquiry into whether Congress created a right enforceable under § 1983: "1) that Congress intended the statutory provision to benefit the plaintiff; 2) that the asserted right is not so 'vague and amorphous' that its enforcement would strain judicial competence; and 3) that the provision couch the asserted right in mandatory rather than precatory terms." *Watson v. Weeks*, 436 F.3d 1152, 1158 (9th Cir. 2006) (citing *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997)) (citations omitted). With regard to the first requirement, we have recognized that "congressional intent to benefit the plaintiff must be shown by statutory language phrased in terms of the persons to be benefited. Anything short of an unambiguously conferred right will not support a 1983 action." *Id.* at 1159 (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283, 284 (2002)) (citations and quotation marks omitted).

Neither § 253(a), nor, for that matter, any other subpart of § 253, mentions the beneficiaries of the section. Section 253 is phrased only in terms of the parties *restricted*—in this case, states and local entities. Indeed, to the extent that any language of the TCA discusses any beneficiaries, it points to "American telecommunications consumers" rather than telecommunications providers. *See* 110 Stat. at 56 (stating that the Act's purpose is "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies"). In other words, § 253(a) does not designate companies like the plaintiffs in this case as the "identifiable class" required for an enforceable § 1983 right. *See Gonzaga Univ.*, 536 U.S. at 284 (quoting *Touche Ross & Co. v. Redington*, 442 U.S. 560, 576 (1979)). We thus agree with the Tenth Circuit that § 253(a) does not create a right enforceable under § 1983.

To the extent that Sprint also argues Congress created an implied private right of action, we rejected that argument as well. The Court has described four factors that explore whether a statute implies a private right of action, *see Cort*, 422 U.S. at 85, but among those factors Congressional intent is paramount. *See Northwest Airlines, Inc. v. Transp. Workers Union of Am.*, 451 U.S. 77, 94 (1981); *Thompson v. Thompson*, 484 U.S. 174, 179 (1988); *Currier v. Potter*, 379 F.3d 716, 725 (9th Cir. 2004) (recognizing the Court's subsequent interpretation of the *Cort* factors). The legislative history of § 253, however, does not support the conclusion that an implied private right of action exists. Senators, in the course of debating the TCA, expressed concern that local governments would bear a heavy burden in defending their ordinances before the FCC in Washington, D.C., and thus

inserted § 253(c)'s public rights-of-way provision. *See Santa Fe*, 380 F.3d at 1266-67 (discussing the legislative history of the TCA). It would be inconsistent with this concern to find that Congress intended to expose municipalities to liability through an implied private right of action. We need not examine the remaining *Cort* factors. *Currier*, 379 F.3d at 725-26 (citing *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 823 F.2d 1349, 1354 (9th Cir. 1987) ("Even if the first factor were satisfied, we find that plaintiffs have failed to clear the second and third *Cort v. Ash* hurdles[.]")).

V.

When Congress passed the TCA in 1996 it expressed its intent to remove barriers inhibiting the development of telecommunications service. Though the act did not "federalize telecommunications land use law," *Southwestern Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51, 57 (1st Cir. 2001), it established meaningful limits beyond which state and local governments may not inhibit telecommunications by preventing the construction of wireless communications facilities. Accordingly, we determine that local zoning ordinances regulating the construction and placement of wireless communications facilities are within the preemptive scope of § 253(a) (removing barriers). Moreover, the County's WTO is outside the scope of permissible land use regulations because it has the effect of prohibiting wireless communication services. We thus affirm the decision of the district court that § 253(a) preempts the WTO as a matter of law. Finally, we conclude that § 253(a) does not create a private right of action enforceable under § 1983 and affirm the district court's denial of relief under the section.

Our decision today does not reach the permissibility of the County's general zoning ordinance, which was not litigated in this case. We **AFFIRM** the judgment of the district court.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
CALIFORNIA

Case No. 03-CV-1398

SPRINT TELEPHONY PCS, L.P., A DELAWARE LIMITED PARTNERSHIP, AND PACIFIC BELL WIRELESS, LLC, A NEVADA LIMITED LIABILITY COMPANY, DBA CINGULAR WIRELESS, PLAINTIFFS.

v.

COUNTY OF SAN DIEGO, A DIVISION OF THE STATE OF CALIFORNIA; GREG COX, IN HIS CAPACITY AS A SUPERVISOR OF THE COUNTY OF SAN DIEGO; DIANNE JACOB, IN HER CAPACITY AS SUPERVISOR OF THE COUNTY OF SAN DIEGO; PAM SLATER, IN HER CAPACITY AS A SUPERVISOR OF THE COUNTY OF SAN DIEGO; RON ROBERTS, IN HIS CAPACITY AS A SUPERVISOR OF THE COUNTY OF SAN DIEGO; AND BILL HORN, IN HIS CAPACITY AS A SUPERVISOR OF THE COUNTY OF SAN DIEGO, DEFENDANTS.

July 8, 2005

MOSKOWITZ, District Judge.

ORDER

On December 1, 2004, Sprint Telephony PCS, L.P. ("Sprint") filed a motion for partial summary judgment.

On December 17, 2004, defendants County of San Diego, Greg Cox, Dianne Jacob, Pam Slater, Ron Roberts and Bill Horn (collectively "County") filed a motion for summary judgment, or, in the alternative, partial summary judgment. For the reasons discussed below, Sprint's motion is **GRANTED IN PART AND DENIED IN PART** and the County's motion is **GRANTED IN PART AND DENIED IN PART**.

I. Procedural Background

Sprint and Pacific Bell Wireless, LLC, dba Cingular Wireless ("Pacific Bell") (collectively "Plaintiffs") commenced this action on July 15, 2003. In their Complaint, Plaintiffs allege that the County's Ordinance No. 9549 N.S. ("WTO" or the "Ordinance"), which amended the San Diego County Zoning Ordinance ("Zoning Ordinance") relating to wireless telecommunications facilities, violates the Federal Telecommunications Act of 1996 (the "TCA"), Pub. L. 104-104, 110 Stat. 56 (1996). The Complaint asserts four causes of action: (1) prohibition of provision of telecommunications service in violation of 47 U.S.C. § 253(a); (2) discriminatory regulation of a public right-of-way in violation of 47 U.S.C. § 253(c) and the Fourteenth Amendment; (3) violation of 42 U.S.C. § 1983; and (4) declaratory judgment.

In an order filed on October 20, 2003, Judge Keep granted in part and denied in part the County's motion to dismiss. Judge Keep granted the motion as to Plaintiffs' second cause of action on the ground that section 253(c) does not provide for a private right of action. Judge Keep also dismissed Plaintiffs' equal protection claim without prejudice. However, the County's motion was denied as to all of the remaining claims. With respect to Plaintiffs' first cause of action, Judge Keep rejected the County's argument that section 253 was inap-

plicable and that section 332(c)(7) was the only avenue for challenging the Ordinance under the TCA.

On November 13, 2003, the County filed a motion for judgment on the pleadings, arguing that Plaintiffs' first cause of action should be dismissed because there is no private right of action under section 253(a). The County also argued that Plaintiff's third cause of action should be dismissed because there is no section 1983 right of action for violations of section 253(a). In an order filed on January 5, 2004, Judge Keep held that Plaintiffs had a private right of action under section 253(a) and could seek section 1983 remedies for violations of section 253(a). *See Sprint Telephony PCS. L.P. v. County of San Diego*, 311 F. Supp. 2d 898 (S.D. Cal. 2004).

On September 16, 2004, this case was reassigned to Judge Moskowitz.

On February 8, 2005, Pacific Bell was dismissed from the case with prejudice pursuant to a stipulation and order thereon.

II. Factual Background

A. *The WTO*

The WTO was enacted by the County in April, 2003. The WTO states that its purpose is "to establish comprehensive guidelines for the placement, design and processing of wireless telecommunications facilities in all zones within the County of San Diego."

The WTO establishes a four-tier application processing structure. (Zon. Ord. § 6985.) Tier 1 applies to invisible wireless facilities and facilities with very low visual impacts. Tier 2 applies to low visibility facilities in the commercial, industrial or special purpose zones, or facilities in any of the zones that are covered by a "Wireless

Community Master Plan," as defined by section 6983(W). Tier 4 applies to non-camouflaged towers greater than 60 feet, or 15 feet above the maximum height limit in the zone, whichever is lower, and all facilities in residential and rural zones except those that fall within Tiers 1 and 2. Tier 3 applies to all facilities other than those meeting the criteria of Tiers 1, 2, or 4.

Applications under Tier 1 are processed as administrative site plans, which are reviewed by the Director of the Department of Planning and Land Use ("Director"). Applications under Tier 2 are processed similarly to Tier 1 applications except that they are also subject to community review. Applications under Tiers 3 and 4 are processed as minor use permits and major use permits, respectively. Whether wireless applications are processed under Tier 3 or 4, they must comply with the use permit requirements in §§ 7350-7399 of the County Zoning Ordinance.

The WTO requires all applicants to submit detailed information regarding the proposed wireless facility. Among other things, applicants are required to provide:

• a map showing all the applicant's existing sites in the local service network associated with the gap the facility is meant to close (Zon. Ord. § 6984(A))

• a visual impact analysis (including photo simulations) showing the maximum silhouette, viewshed analysis, color and finish palette and proposed screening (Zon. Ord. § 6984(B))

• evidence that establishes that the proposed facilities have been designed to the minimum height required from a technological standpoint for the proposed site (Zon. Ord. § 6985(C))

• the anticipated maintenance and monitoring program for the antennas, back-up equipment and landscaping (*Id.*)

• Noise and acoustical information (*Id.*)

• a plan showing all proposed landscaping, screening and proposed irrigation (*Id.*)

• a letter stating the applicant's willingness to allow other carriers to co-locate on their facilities (*Id.*)

Furthermore, the Director may "require additional information based upon specific project factors." (Zon. Ord. § 6984.)

The WTO also imposes general regulations and design regulations. (Zon. Ord. §§ 6985(C), 6987.) A number of these regulations pertain to requirements that the facilities be "camouflaged", "consistent with community character," "compatible with existing architectural elements, building materials and other site characteristics," and have minimal "visual impact." (Zon. Ord. §§ 6985(C)(1), (3), 6987(B), (F), (O).)

In addition, the WTO includes the following set-back requirement: "Telecommunications towers located adjacent to a residential use shall be set back from the nearest residential lot line by a distance at least equal to its total height or 50 feet, whichever is greater." (Zon. Ord. § 6985(C)(4).)

B. *The Use Permit Requirements*

The use permit procedures require that applicants submit documents including: a list of the names of all persons having an interest in the application (as well as the names of all persons having any ownership interest in the property involved); complete plans (including a

plot plan); and a description of the property involved and the proposed use permit. (Zon. Ord. § 7354(b)(1)-(2).)

All applications for a use permit are subject to a public hearing requirement. (Zon. Ord. § 7356.) In determining whether to grant a use permit, the Planning Commission (or the Director, in the case of a minor permit) is required to make the following findings:

That the location, size, design, and operating characteristics of the proposed use will be compatible with adjacent uses, residents, buildings, or structures, with consideration given to:

1. Harmony in scale, bulk, coverage and density;

2. The availability of public facilities, services and utilities;

3. The harmful effect, if any, upon desirable neighborhood character;

4. The generation of traffic and the capacity and physical character of surrounding streets;

5. The suitability of the site for the type and intensity of use or development which is proposed; and to

6. Any other relevant impact of the proposed use . . . .

(Zon. Ord. § 7358(a).)

Use permits may be granted or modified "subject to the performance of such conditions . . . and for such period of time as the Planning Commission, the Board of Supervisors . . . or the Director . . . shall deem to be reasonable and necessary or advisable under the circumstances so that the objectives of the Zoning Ordinance shall be achieved." (Zon. Ord. § 7362.) A use permit may be revoked or modified if one or more of the conditions

upon which such permit was granted have been violated. (Zon. Ord. § 7382(a)(2).) Any person violating any condition of a use permit shall be deemed guilty of a misdemeanor unless, in the discretion of the prosecutor, it is charged as an infraction. (Zon. Ord. § 7703.)

A major use permit decision may be appealed to the Board of Supervisors. (Zon. Ord. § 7366(a)(1).) A minor use permit decision may be appealed to the Planning Commission. (Zon. Ord. § 7366(a)(2).) Following the filing of an appeal, a public hearing shall be scheduled and noticed and all interested persons may appear and present evidence. (Zon. Ord. § 7366(h).) The authority having appellate jurisdiction may grant or modify the use permit subject to "specified conditions it imposes pursuant to Section 7362" or may revoke or deny the use permit "as is appropriate." (Zon. Ord. § 7366(i).)

III. Discussion

Sprint seeks partial summary judgment on its section 253(a) claim and section 1983 claim (liability only). The County seeks summary judgment on these same claims.

The County's primary argument is that Sprint cannot challenge the WTO under 47 U.S.C. § 253(a) and is limited to the remedies provided by 47 U.S.C. § 332(c)(7). As discussed below, the Court finds that (1) section 253(a) is applicable; (2) the WTO, as presently drafted, violates section 253(a); and (3) the WTO does not fall within the safe harbor of section 253(c).

The Court also finds that Sprint is not entitled to damages under section 1983 because section 253(a) does not give rise to a private right of action. Nevertheless, Sprint's preemption claim is still viable under the Supremacy Clause.

Accordingly, the Court grants summary judgment in favor of Sprint, and against the County, on Sprint's first cause of action for violation of section 253(a) and fourth cause of action for declaratory relief. The Court grants summary judgment in favor of the County, and against Sprint, on Sprint's third cause of action for violation of 42 U.S.C. § 1983.

A. *Applicability of Section 253(a)*

The County has resurrected its argument that Sprint's section 253(a) and section 1983 claims fail because section 253(a) is inapplicable. The County reasserts that if Sprint wishes to mount a TCA challenge against the WTO, it must proceed under section 332(c)(7). Once again, the Court rejects this argument.

In denying the County's motion to dismiss Sprint's section 253(a) and section 1983 claims, Judge Keep held that section 253(a) applies to facial challenges of ordinances whereas section 332(c)(7) applies to individual siting *decisions* made under an ordinance. Sprint argues that Judge Keep's ruling is "law of the case" that precludes the Court from reexamining the issue. Sprint is incorrect. The doctrine of "law of the case" does not "impinge upon a district court's power to reconsider its own interlocutory order provided that the district court has not been divested of jurisdiction over the order." *City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 888 (9th Cir. 2001). *See also United States v. Smith*, 389 F.3d 944, 949 (9th Cir. 2004).

However, for the most part, the Court agrees with Judge Keep's ruling, which is consistent with the language of section 253(a) and section 332(c)(7).[1] Section

[1] The Court notes that the County did not bring a motion for reconsideration before Judge Keep.

253(a) provides: "No state or local *statute* or *regulation* . . . may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." (Emphasis added.) In contrast, section 332(c)(7)(A) provides:

> Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over *decisions* regarding the placement, construction, and modification of personal wireless service facilities.

(Emphasis added.)

The County argues that section 332(c)(7) also includes language indicating that section 332 extends to regulations. Specifically, 47 U.S.C. § 332(c)(7)(B) provides, in relevant part:

> (B) Limitations
>
> (i) The *regulation* of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—
>
> (I) shall not unreasonably discriminate among providers of functionally equivalent services; and
>
> (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.
>
> * * * * * *
>
> (iv) No State or local government or instrumentality thereof may *regulate* the placement, construction, and modification of per-

> sonal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(Emphasis added.)

Viewing this language in context, however, it is clear that section 332's primary focus is on individual decisions. The provisions of section 332(c)(7)(B) are *limitations* on the general authority set forth in section 332(c)(7)(A), which concerns *decisions* regarding the placement, construction, and modification of personal wireless service facilities. Although the term "decisions" could be broadly construed as including regulations, other provisions in section 332(c)(7) indicate that "decisions" refers to decisions on individual applications to place, construct, or modify personal wireless service facilities.

Subsection (c)(7)(B)(ii) provides that "[a] State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed . . . . " Subsection (c)(7)(B)(iii) provides that "[a]ny decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record."

Subsection (c)(7)(B)(v), the remedy provision, states that "any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this sub-

paragraph may, within 30 days *after such action or failure to act,* commence an action in any court of competent jurisdiction." (Emphasis added.) Reading this provision in conjunction with subsections (c)(7)(B)(ii) and (c)(7)(B)(iii), the phrase "action or failure to act" refers to a decision or failure to make a decision on a request to place, construct, or modify personal wireless service facilities.

The short limitations period set forth in subsection (c)(7)(B)(v) supports the conclusion that section 332 concerns challenges to decisions on individual applications or requests. If the 30-day limitations period governed facial challenges to ordinances, such challenges would have to brought within 30 days of the implementation of the ordinances at issue. Any party who failed to bring suit within the 30 days, even if the party lacked standing at that time, would be barred from raising a facial challenge.[2] Congress could not have intended such a result.

It is possible that a court reviewing an individual decision under section 332 could also properly reach the issue of whether the regulation or ordinance underlying the decision is valid. *See, e.g., APT Pittsburgh, Ltd. v. Penn Township Butler County,* 196 F.3d 469 (3rd Cir. 1999). However, nothing in section 332 precludes facial challenges of wireless regulations under section 253(a).

Sprint properly brought its challenge to the WTO under section 253(a). Accordingly, the Court proceeds to the merits of Sprint's 253(a) claim.

---

[2] In contrast, a six-year statute of limitations applies to an APA challenge to a regulation. *See, e.g., Sierra Club v. Penfold,* 857 F.2d 1307, 1315 (9th Cir. 1988).

B. *Section 253(a) Preemption*

Section 253(a) is an express preemption clause which bars all state and local regulations that "prohibit or have the effect of prohibiting" the ability of any entity to provide interstate or intrastate telecommunications service. *See City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1175 (9th Cir. 2001). The question before the Court is whether the regulatory scheme established by the WTO prohibits or has the effect of prohibiting Sprint from providing wireless telecommunications service.[3]

In determining whether section 253(a) preempts an ordinance, courts must analyze whether the ordinance's requirements "in combination" have the effect of prohibiting the provision of telecommunications services. *Auburn*, 260 F.3d at 1175-76. *See also Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1240-42 (9th Cir. 2004). Section 253(a) does not only preempt regulations that actually prohibit the provision of telecommunications services, but also preempts those that "may ... have the effect of prohibiting" the provision of such services. *Auburn*, 260 F.3d at 1175; *Portland*, 385 F.3d at 1241.

Courts applying section 253(a) have found that certain features of regulations, in combination, have the ef-

---

[3] The County argues that the Complaint does not set forth a preemption claim. The County points out that although Sprint's second cause of action alleges a violation of section 253(a), it does not mention "preemption." However, the caption page lists "preemption" as one of the causes of action, the body of the Complaint explains that "the preemption under Section 253 is 'virtually absolute' " (Complaint, ¶ 24), and Sprint seeks injunctive relief. Given that Sprint is seeking damages in connection with its section 1983 claim, there can be no question that Sprint's section 253(a) claim is a preemption claim.

fect of prohibiting the provision of telecommunications services. These features include, but are not limited to, numerous submission or disclosure requirements, retention of discretion by the city to require further disclosures, public hearing requirements, unlimited discretion of the city to grant or deny permits, and civil and/or criminal penalties. *See, e.g., Auburn*, 260 F.3d at 1175-77; *Cox Communications PCS, L.P. v. City of San Marcos*, 204 F. Supp. 2d 1260 (S.D. Cal. 2002); *Qwest Communications Corp. v. City of Berkeley*, 146 F. Supp. 2d 1081 (N.D. Cal. 2001); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004).

In *Auburn*, Qwest, a major telecommunications provider, argued that section 253(a) preempted the ordinances of certain Washington municipalities. These ordinances required telecommunications providers to obtain a franchise to install facilities in public rights-of-way. To obtain a franchise, providers were required to submit a lengthy and detailed application form, including maps, corporate policies, documentation of licenses, certain specified items, and "[s]uch other and further information as may be requested by the City." *Auburn*, 260 F.3d at 1176. Two of the cities required a public hearing before granting or revoking a franchise. *Id.* Each of the franchise systems authorized the cities to consider "discretionary factors that have nothing to do with the management or use of the right-of-way." *Id.* The "ultimate cudgel" was that each city reserved "discretion to grant, deny, or revoke the franchises and the Cities [could] revoke the franchise if the terms in the ordinance [we]re not followed, even allowing the Cities to remove the company's facilities." *Id.* The ordinances also authorized civil and criminal penalties. *Id.*

The *Auburn* court found that "[t]aken together, these requirements have the effect of prohibiting Qwest and other companies from providing telecommunications services and create a substantial barrier to entry into and participation in the . . . Cities' telecommunications markets." *Id.* (citations omitted). The court explained that its conclusion was "based on the variety of methods and bases on which a city may deny a franchise, not the mere franchise requirement, or the possibility of denial alone." *Id.* at 1176 n.11.

In *Qwest Communications v. City of Berkeley*, 146 F. Supp. 2d 1081 (N.D. Cal. 2001), the issue before the court was whether Qwest was entitled to a preliminary injunction on its claim that section 253(a) preempted Berkeley's ordinance governing telecommunications carriers seeking to install facilities in public rights-of-way. Under the ordinance, all carriers were required to obtain a Special Telecommunications Permit. *Id.* at 1088. The preliminary process required: registration and applicable fees; licensing for carriers not exempted from franchising requirements; significant disclosure requirements along with discretion to require further disclosure; and compliance with other federal, state, and local laws such as excavation and encroachment permits. *Id.* at 1097-98. Thereafter, the ordinance imposed requirements concerning "the installation, maintenance, operation, removal and upgrade of any equipment or facilities installed, including record-keeping, reporting, insurance, indemnity, and financial requirements." *Id.* at 1097. After notifying the affected public and holding a public hearing, Berkeley would make a decision on the application based on various enumerated factors. *Id.* at 1098. When the carrier was not exempted from licensing and franchise requirements, Berkeley also considered the type of service provided, the effect on public health,

safety and welfare, and "such other [unnamed] factors-as may demonstrate that the grant to use the public rights-of-way will serve the community interest." *Id.* Violation of the Berkeley's ordinance could subject the applicant-carrier to civil and criminal penalties. *Id.* The court found that Berkeley's ordinance imposed an "onerous burden" on telecommunications carriers seeking to enter Berkeley's market and that, accordingly, Qwest had demonstrated a substantial likelihood of success that section 253(a) preempted the ordinance. *Id.*

In *Cox Communications PCS, L.P. v. City of San Marcos*, 204 F. Supp. 2d 1260 (S.D. Cal. 2002), Cox Communications (dba Sprint PCS) brought a motion for a preliminary injunction, arguing that the City of San Marcos' regulations collectively created a substantial barrier to entry in violation of section 253(a). San Marcos required telecommunications providers to obtain conditional use permits in order to install facilities in public rights-of-way. *Id.* at 1262-63. To obtain a permit, providers were required to file an application, which included a complete plan, description of the property, the proposed use, satisfactory evidence that the applicant would begin construction within six months of receiving the permit, and a fee of $3,476. *Id.* at 1262. A public hearing was required. *Id.* In addition, the applicant was required to show that its proposed use of the rights-of-way w[ould] not be "materially detrimental to the public health, safety, or welfare or injurious to the property or improvement in such vicinity and zone in which the property is located" and "w[ould] not adversely affect any master or precise plan adopted pursuant to law." *Id.* San Marcos retained the discretion to grant permits "upon such conditions . . . as [the City] shall deem to be reasonable and necessary or advisable under the circumstances so that the objectives of this ordinance shall be

achieved." *Id.* at 1262-63. Violators of the ordinance could be punished by fine and/or imprisonment. *Id.* at 1263. Relying on *Auburn* and *Berkeley*, the court found that Sprint had established a substantial likelihood of success on its claim that the regulatory scheme created a substantial barrier to entry in violation of section 253(a). *Id.* at 1266.

Courts outside of the Ninth Circuit have also struck down ordinances under section 253(a) based on burdensome submission requirements and/or provisions allowing cities to grant or deny applications for permits or franchises in the exercise of their discretion. For example, in *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004), the court granted summary judgment in favor of Qwest on its section 253(a) claim based on the challenged ordinance's complex informational requirements, provisions allowing the city to demand "such other information as the city may reasonably require," and provisions granting the city broad discretion in determining whether an application was "in the best interest of the public." *Id.* at 1270. The court explained that these provisions allow the city "unfettered discretion" to prohibit the provision of services. *See also TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 82 (2d Cir. 2002) ("[T]he Ordinance's provisions allowing the White Plains Common Council to consider any factor deemed to be in the public interest provide precisely the sort of discretion to prohibit telecommunications services that § 253 preempts."); *TC Systems, Inc. v. Town of Colonie*, 263 F. Supp. 2d 471, 483 (N.D.N.Y. 2003) (holding that town's franchise regulations violated section 253(a) because the regulations provided the town with "unbounded discretion to pick and choose between providers.").

Like the ordinances and regulations in the cases discussed above, the WTO includes a number of features that have the collective effect of prohibiting the provision of telecommunications service. Although the WTO establishes a four-tier application processing structure, due to the restrictive requirements of Tiers 1 and 2, all applications within the right-of-way and most outside of the right-of-way have been processed under the use permit requirements of Tiers 3 and 4. (Hamler Decl. Exh. A.)

As detailed in Section II, *supra*, the WTO and the use permit regulations impose burdensome submission requirements. Among other things, applicants must submit a list of the names of all persons having an interest in the application, complete plans, a map showing all the applicant's existing sites in the local service network, a detailed visual impact analysis, evidence that establishes that the proposed facilities have been designed to the minimum height, the anticipated maintenance and monitoring program for the equipment and landscaping, noise and acoustical information, a landscaping plan, a letter stating the applicant's willingness to allow other carriers to co-locate on their facilities "wherever technically and economically feasible and aesthetically desirable," and any "additional information based upon specific project factors" that the Director may require. (Zon. Ord. §§ 6984(A)-(C), 7354(b)(1)-(2).) The last two requirements are the ones that trouble the Court.

The requirement that applicants state their willingness to co-locate is unreasonable because it is unclear what the terms and conditions of co-location would be (e.g., whether the applicant would receive fair compensation). The provision that applicants provide "any additional information" that may be required is overbroad.

No limit is placed on what and how much additional information the Director may require.

Similarly, the use permit requirements allow for the exercise of unfettered discretion at every level of the application process. A permit may be granted if the "location, size, design, and operating characteristics of the proposed use *will be compatible* with adjacent uses, residents, buildings, or structures, with consideration given to" specified factors, including "*any other relevant impact* of the proposed use." (Zon. Ord. § 7358(a)) (emphasis added.) Thus, the decision-maker can consider anything bearing on "compatibility," a subjective and hard-to-define standard in itself. Similarly, considerable discretion may also be exercised in determining whether the proposed facilities are "camouflaged," "consistent with community character," and have minimal "visual impact." (Zon. Ord. §§ 6985(C)(1), (3), 6987(B), (F), (O).)

Use permits may be granted or modified "subject to the performance of such conditions . . . and for such period of time as the Planning Commission, the Board of Supervisors . . . or the Director . . . *shall deem to be reasonable and necessary or advisable under the circumstances* so that the objectives of the Zoning Ordinance shall be achieved." (Zon. Ord. § 7362) (emphasis added.) In other words, the Director can impose whatever conditions the Director finds appropriate to further the stated purpose of the Zoning Ordinance, which includes the broad goals of public health, safety and welfare, preservation of community character and aesthetic quality, and minimization of intrusion into residential areas. (Zon. Ord. § 6982.)

On appeal, the appellate authority has the same unbridled discretion to grant or modify permits. Section 7336(i) provides that the authority having appellate ju-

risdiction may grant or modify the use permit subject to "specified conditions it imposes pursuant to Section 7362."[4]

All applications for a use permit and all appeals are subject to a public hearing requirement. (Zon. Ord. §§ 7356, 7366(h).) Pointing to a conference report (H.R. Conf. Rep. No. 104-458 at 208, 1996 U.S.C.C.A.N. at 223), the County argues that Congress envisioned that public hearings would be held on applications to build wireless facilities. The Court agrees that there is nothing wrong with public hearings per se. However, here, there are no provisions restricting what can be discussed at the public hearings. The lack of restrictions on what types of objections or concerns can be raised at hearings is especially problematic in light of the County's unfettered discretion to deny applications or impose conditions upon the granting of applications.

The violation of a condition imposed solely in the discretion of the appropriate authority carries adverse consequences. The permit may be revoked or modified. (Zon. Ord. § 7382(a)(2).) Furthermore, any person violating any condition of a use permit shall be deemed guilty of a misdemeanor unless, in the discretion of the prosecutor, it is charged as an infraction. (Zon. Ord. § 7703.)

Wireless providers may avoid Tier 3 or 4 review by submitting to a "master plan." However, the "master

---

[4] The County argues that the use permit provisions do not give discretion to *deny* applications, but, rather, to grant or modify. However, there is no real distinction between the County's ability to impose whatever conditions it chooses upon the granting of applications and the discretion to deny applications.

plan" option presents many of the same problems as Tier 3 or 4 review. A "Wireless Community Master Plan" is defined as:

> A Master Plan of preferred sites and designs for a defined geographic area prepared in co-operation with one or more wireless service providers; formally submitted by the community planning group or sponsor group or by a homeowners association representing at least 4,000 residents and at least 5,000 acres to the Director of Planning and Land Use; *reviewed by the Director for such issues as aesthetics and community compatibility;* and following *public review,* approved by the Director.

(Zon. Ord. § 6983(W)) (emphasis added.) There are no constraints on the conditions that can be required in a Wireless Community Master Plan. (Undisputed Fact 29.)

Viewing the provisions discussed above in combination, the Court finds that the County's wireless regulations have the effect of prohibiting the provision of telecommunications services. As in *Auburn,* the County has reserved the discretion to refuse to grant applications on a "variety of methods and bases." *Auburn,* 260 F.3d at 1176 n.11.[5]

---

[5] Sprint also argues that the WTO's set-back requirement has the effect of prohibiting wireless service. Based on the evidence before the Court, it is unclear whether, if applied as written, the set-back requirement would prevent the placement of wireless facilities in large areas of the County. However, the Court need not reach this issue because it finds that the WTO is preempted for the reasons discussed above. Moreover, the County claims that it has interpreted the set-back requirement as not applying to sites located along the County's road or right-of-way. (Hulse Decl., ¶ 4.)

Relying on *Portland*, 385 F.3d at 1242, the County argues that the Court should not apply section 253(a) to the use permit requirements because such requirements preexisted the WTO and apply to all applications for a conditional use permit. However, *Portland* is distinguishable. In *Portland*, Qwest challenged a number of ordinances that had been adopted over the course of many years and were applicable to utilities generally. Other than Ashland, Eugene, and Springfield, there was no indication that Portland or the other city defendants had passed ordinances that were specific to the telecommunications process. *Id.* at 1242. Although Eugene had enacted a telecommunications ordinance, Qwest did not challenge the telecommunications ordinance but, rather, separately challenged six general Eugene Code provisions that were not telecommunications-specific. *Id.* at 1242 nn.5-6. It was in this context that the Ninth Circuit noted, "We doubt whether *City of Auburn* can be read so broadly as to apply to ordinances that are not specific to the telecommunications permitting process." *Id.* at 1242.

Here, Sprint challenges the entire regulatory scheme established by the WTO. Although the use permit provisions are not telecommunications specific, they are an integral part of the wireless regulatory framework governing wireless providers. Accordingly, the Court properly included the use permit provisions in its section 253(a) analysis.

C. *Section 253(c) Safe Harbor*

Regulations that violate section 253(a) are not preempted if they fall within the safe harbor of Section 253(c). Section 253(c) provides:

> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

Sprint argues that section 253(c) is an affirmative defense that the County waived by failing to plead it in its answer. The Court disagrees. Consideration of section 253(c) is a necessary part of the preemption analysis under section 253, not a defense. *See Portland*, 385 F.3d at 1242 n.7 ("If the district court finds that any of the Cities' ordinances are preempted by § 253(a), it must also consider whether the preempted ordinance provisions fall within the savings clause of § 253(c).")

The County contends that the WTO is saved by section 253(c) because it is a zoning ordinance which manages the public rights-of-way. However, the WTO is not limited to the regulation of wireless facilities in the public rights-of-way. The WTO applies to "all proposed wireless facilities in the unincorporated area of the County, including those located on private property as well as those within the County-owned rights-of-way." (County's Mem. of Points and Authorities in Support of Motion for Summary Judgment, 2:22-24.) Indeed, according to the County, most of the applications are for proposed facilities on private property. (Sprint's Request for Judicial Notice, Exh. 4, Decl. of David Hulse, ¶ 3.)

Section 253(c) clearly does not apply to the extent that the WTO goes beyond regulating the public rights-of-way and arguably does not apply to the WTO at all.

In *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 81 (2d Cir. 2002), the Second Circuit held that even though portions of a city proposal (which required prior approval of the locations of the plaintiff's network) might be permissible if *limited to public land*, the sections as written restricted the plaintiff's ability to develop a network *even on private property* and, therefore, were invalid. In cases such as *Auburn* and *Berkeley*, where the courts proceeded to a section 253(c) analysis, the challenged ordinances specifically governed the use of *public rights-of-way* by telecommunication providers.

Even if the Court were to interpret the WTO as applying to the *public rights-of-way only*, many of its requirements would not qualify as "management of the public rights-of-way." In *Auburn*, the Ninth Circuit looked to the FCC's description of management of the public rights-of-way. *Auburn*, 260 F.3d at 1177. According to the FCC:

> [S]ection 253(c) preserves the authority of state and local governments to manage public rights-of-way. Local governments must be allowed to perform the range of vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, to manage gas, water, cable (both electric and cable television), and telephone facilities that crisscross the streets and public rights-of-way . . . [T]he types of activities that fall within the sphere of appropriate rights-of-way management . . . include coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping

> track of the various systems using the right-of-way to prevent interference between them.

In re TCI Cablevision of Oakland County, Inc., 12 F.C.C.R. 21396 (F.C.C. 1997), ¶ 103.

Auburn also quoted Senator Dianne Feinstein, who, during the floor debate on section 253(c), offered examples of the types of restrictions that Congress intended to permit under section 253(c), including requirements that:

> (1) "regulate the time or location of excavation to preserve effective traffic flow, prevent hazardous road conditions, or minimize notice impacts;" (2) "require a company to place its facilities underground, rather than overhead, consistent with the requirements imposed on other utility companies;" (3) "require a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavation;" (4) "enforce local zoning regulations;" and (5) "require a company to indemnify the City against any claims of injury arising from the company's excavation."

In re Classic Telephone, Inc., 11 F.C.C.R. 13082 (F.C.C. 1996), ¶ 39 (quoting 141 Cong. Rec. S8172) (daily ed. June 12, 1995) (statement of Sen. Feinstein, quoting letter from the Office of City Attorney, City and County of San Francisco).

Seizing on Senator Feinstein's comment regarding enforcement of local zoning regulations, the County argues that the WTO is a zoning ordinance which falls within the definition of management of the public rights-of-way. The Court rejects the proposition that any re-

quirement that falls within the broad umbrella of "zoning" falls with section 253(c)'s safe harbor.

In *Auburn*, the Ninth Circuit refused to grant safe harbor protection to regulations that were "*more than necessary* to 'manage the rights-of-way.' " *Auburn*, 260 F.3d at 1178 (emphasis added). The court held that regulations requiring the applicant to submit proof of its financial, technical, and legal qualifications and a description of telecommunications services to be provided did not "directly relate" to management of the rights-of-way and were not saved by section 253(c). *Id.* The court also held that the provisions of the ordinances that gave the cities unfettered discretion to insist on unspecified franchise terms and to grant, deny, or revoke a franchise based on unnamed factors went "far beyond the limits of § 253(c), encompassing anything a city deems to be in the public interest." *Id.* at 1179.

Here, as in *Auburn*, the regulations that permit the County to require whatever additional information it chooses and to exercise unfettered discretion in denying or imposing conditions on the granting of a use permit are more than necessary to manage the rights-of-way. These regulations do not fall within the scope of section 253(c).

The WTO does not qualify for safe harbor protection under section 253(c). Therefore, the WTO provisions that violate section 253(a), as discussed in Section III.B., *supra*, are preempted.

D. *Preservation of Zoning Authority*

Pointing to the legislative history of section 332 and cases decided under section 332, the County argues that Congress intended to preserve local zoning authority with respect to the placement, construction, and modifi-

cation of personal wireless service facilities and intended that local governments be able to deny permit applications based on aesthetics and other local zoning criteria. The Court does not dispute this proposition.

However, Congress also placed limitations on local zoning authority. Section 332(c)(7)(B)(i) provides:

> The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—
>
> (I) shall not unreasonably discriminate among providers of functionally equivalent services; and
>
> (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

These limitations are consistent with section 253(a)'s proscription against regulations that "prohibit or have the effect of prohibiting" the provision of telecommunications service.

Thus, local governments may, in the exercise of their zoning authority, impose aesthetic requirements (*see, e.g., Ominpoint Communications Enter., L.P. v. Warrington Township*, 63 F. Supp. 2d 658 (E.D. Pa. 1999) (upholding condition of approval that provider disguise tower as a tree)) or even bar wireless facilities in certain areas (*see, e.g., APT Pittsburgh Ltd. v. Penn Township Butler County*, 196 F.3d 469 (3rd Cir. 1999) (upholding validity of zoning ordinance restricting communications towers to certain districts in Township)), *as long as they do not discriminate* against providers of functionally equivalent services *or otherwise prohibit or have the ef-*

fect of prohibiting the provision of wireless service. As already discussed, various aspects of the WTO run afoul of the latter limitation on local zoning authority.

E. *Severability*

To determine whether the invalid portions of the WTO are severable, the Court must look to state law. *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996). As discussed in *Berkeley,* under California law, an offending provision of an ordinance can be severed from the ordinance if the provision is grammatically, functionally, and volitionally separable. *Berkeley,* 146 F. Supp. 2d at 1102.

A provision is grammatically severable if it "can be removed as a whole without affecting the wording of any" of the measure's other provisions. *Id.* (quoting *Hotel Employees and Rest. Employees Int'l Union v. Davis,* 21 Cal. 4th 585, 613, 88 Cal. Rptr. 2d 56, 981 P.2d 990 (1999)). It is functionally severable if it is not necessary to the measure's operation and purpose. *Id.* Finally, it is volitionally severable if it was not of critical importance to the measure's enactment: "The final determination depends on whether the remainder .... is complete in itself and would have been adopted by the legislative body had the latter foreseen the partial invalidity of the statute." *Id.* (quoting *Calfarm Ins. Co. v. Deukmejian,* 48 Cal. 3d 805, 821, 258 Cal. Rptr. 161, 771 P.2d 1247 (1989)).

In this case, the offending provisions are interwoven throughout the Zoning Ordinance and affect, among other things, the application procedures, approval requirements, the discretionary authority to grant or modify permits, public hearing requirements, the revocation of permits, and the imposition of penalties. As in *Auburn,* due to the number and variety of invalid provi-

sions, the Court cannot excise the objectionable portions of the Ordinance "without rendering the end product a Swiss cheese regulation that would not be capable of 'accomplishing the ordinances' legislative purposes." *Auburn*, 260 F.3d at 1181. *See also Berkeley*, 146 F. Supp. 2d at 1102 (explaining that the Court could not sever the preempted ordinance provisions because the entire application process and registration and permit requirements were "rife with invalid requirements.")

Therefore, the WTO is preempted in its entirety. Sprint is entitled to summary judgment on its first cause of action for violation of section 253(a), and the County is enjoined from enforcing the WTO.

F. *Section 1983 Claim*

In addition to seeking injunctive and declaratory relief, Sprint seeks damages under 42 U.S.C. § 1983. For the reasons discussed below, the Court finds that section 253(a) does not give rise to a private right enforceable through 42 U.S.C. § 1983.

Whether section 253(a) confers individual rights enforceable through section 1983 is a difficult question which has divided the courts. Some Courts have held that section 253(a) does not give rise to a private right of action under section 1983. *See Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004); *Qwest Communications Corp. v. City of Berkeley*, 202 F. Supp. 2d 1085 (N.D. Cal. 2001). Other court decisions, including a prior decision of Judge Keep in this case, hold that section 253 confers a private right of action enforceable through section 1983. *NextG Networks of New York, Inc. v. City of New York*, 2004 WL 2884308 (S.D.N.Y. Dec. 10, 2004); *Sprint Telephony PCS v. County of San Diego*, 311 F. Supp. 2d 898 (S.D. Cal. 2004). In a two-

judge decision, the Eleventh Circuit took a unique approach, holding that section 253 supports a private cause of action under section 1983, but only when the challenged statute, ordinance, or regulation purports to address the management of the public rights-of-way, thereby potentially implicating subsection (c). *BellSouth Telecommunications, Inc. v. Town of Palm Beach*, 252 F.3d 1169 (11th Cir. 2001).

To determine which approach is the correct one, this Court must examine the language and structure of section 253 in addition to pertinent legislative history. A court's role in determining whether personal rights exist under section 1983 is no different than its role in discerning whether personal rights exist in the implied right of action context. *Gonzaga University v. Doe*, 536 U.S. 273, 285 (2002). "Both inquiries simply require a determination as to whether or not Congress intended to confer individual rights upon a class of beneficiaries." *Id.*

Once a plaintiff demonstrates that a statute creates an individually enforceable right in a class of beneficiaries to which he belongs, there is a rebuttable presumption that the right is enforceable under section 1983. *City of Rancho Palos Verdes v. Abrams*, ___ U.S. ___, 125 S. Ct. 1453, 1458 (2005). The defendant may rebut this presumption by showing that Congress did not intend a remedy under section 1983. *Id.* Such evidence of congressional intent may be found directly in the statute creating the right or inferred from the statute's creation of a "comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Id.* (quoting *Blessing v. Freestone*, 520 U.S. 329, 341 (1997)).

The Supreme Court has set forth four factors courts should consider in determining whether a statute impliedly creates privately enforceable rights: (1) whether

the plaintiff is "one of the class for whose especial benefit" the statute was enacted; (2) whether there is any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one; (3) whether implying a private remedy is consistent with the underlying purposes of the legislative scheme; and (4) whether the cause of action is in an area of law traditionally the concern of the states. *Cort v. Ash*, 422 U.S. 66, 78 (1975).

The second and third factors, which bear upon congressional intent, are determinative. *Currier v. Potter*, 379 F.3d 716, 725 (9th Cir. 2004). The second factor, in particular, is "the key inquiry in this calculus." *Opera Plaza Residential Parcel Homeowners Ass'n v. Hoang*, 376 F.3d 831, 835 (9th Cir. 2004).

Here, the second and third factors compel the conclusion that section 253 does not create privately enforceable rights in any context. Section 253 does not explicitly provide for or prohibit private causes of action. However, subsection (d) provides that the FCC shall preempt the enforcement of statutes, regulations, or legal requirements which violate subsection (a) or (b). Notably, subsection (d) does not mention subsection (c). The legislative history explaining the reason for this omission also establishes that Congress did not intend to create privately enforceable rights under section 253.

The legislative history of section 253(d) is set forth in *Palm Beach*, 252 F.3d at 1190-91. As initially drafted, subsection (d) provided for FCC preemption whenever any statute, regulation, or legal requirement violated or was inconsistent with "this section." S. 652, 104th Cong. (1995). Senators Feinstein and Kempthorne expressed concern that subsection (d) would impose a substantial burden on cities that would "have to send delegations of city attorneys to Washington to go before a panel of tele-

communications specialist [s] at the FCC, on what may be [a] very broad question of State or local government rights." 141 Cong. Rec. S8170 (daily ed. June 12, 1995). The Senators felt that these types of disputes should be resolved by local federal district courts and sponsored an amendment that would "strike the authority of the Federal Communications Commission to preempt state or local regulations that establish barriers to entry for interstate or intrastate telecommunications services." 141 Cong. Rec. S8305 (daily ed. June 14, 1995).

Senator Gorton responded with an amendment containing the current language of subsection (d). Senator Gorton explained:

> So my modification of the Feinstein amendment says that in the case of these purely local matters dealing with rights of way, there will not be a jurisdiction on the part of the FCC immediately to enjoin the enforcement of those local ordinances. But if, under section (b), a city or county makes quite different rules relating to universal service or the quality of telecommunications services-the very heart of this bill—then there should be a central agency at Washington, DC, which determines whether or not that inhibits the competition and the very goals of this bill.
>
> * * * * * *
>
> [The Gorton amendment] retains not only the right of local communities to deal with their rights of way, *but their right to meet any challenge on home ground in their local district courts* .... The states retain the

> right under subsection (d) to pass all kinds of legislation that deals with telecommunications providers, subject to the provision that they cannot impede competition. The determination of whether they have impeded competition, not by the way they manage trees or rights of way, but by the way they deal with substantive law dealing with telecommunications entities. That conflict should be decided in one central place, by the FCC. *The appropriate balance is to leave purely local concerns to local entities, but to make decisions on the natural concerns which are at the heart of this bill in one central place so they can be consistent across the country.*

141 Cong. Rec. S8306, S8308 (daily ed. June 14, 1995) (emphasis added). The Senate voted down the Feinstein-Kempthorne amendment and adopted the Gorton Amendment by a voice vote. *Palm Beach*, 252 F.3d at 1191.

Based on this legislative history, it is clear that when management of public rights-of-way is not at issue, the FCC, not private individuals, has enforcement authority under section 253. The trickier question is whether Congress intended to confer individually enforceable rights when subsection (c) is implicated.

The Eleventh Circuit reasoned that subsection (d) "establishes different forums based on the subject matter of the challenged statute or ordinance," and that a private cause of action exists under section 253 "to seek preemption of a state or local statute, ordinance, or other regulation only when that statute, ordinance, or other regulation purports to address the management of the public rights-of-way, thereby potentially implicating

subsection (c)." *Palm Beach*, 252 F.3d at 1191. All other section 253 challenges fall within the jurisdiction of the FCC. *Id.*

The Court disagrees with the reasoning of *Palm Beach*. The objective of the Gorton Amendment was to prevent the FCC from forcing local governments to go to Washington, D.C., to defend ordinances affecting public rights-of-way and to allow challenges to such ordinances to take place in local forums. *Berkeley*, 202 F. Supp. 2d at 1096. The focus of the amendment was on *where* preemption challenges would be decided. *Santa Fe*, 380 F.3d at 1266. The amendment was not concerned with whether individual plaintiffs could obtain damages and does not require a finding that Congress intended to create individually enforceable rights under section 253.

Palm Beach overlooks the fact that a plaintiff may bring preemption claims under the Supremacy Clause even if the federal statute at issue does not create a private right of action. *Western Air Lines, Inc. v. Port Auth. of New York and New Jersey*, 817 F.2d 222, 225-26 (1987); *Santa Fe*, 380 F.3d at 1267. "A claim under the Supremacy Clause simply asserts that a federal statute has taken away local authority to regulate a certain activity. In contrast, an implied private right of action is a means of enforcing the substantive provisions of a federal law." *Western Air Lines*, 817 F.2d at 225.

The Supremacy Clause is not a "source of any federal rights," but, rather, "secure[s] federal rights by according them priority whenever they come in conflict with state law." *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989) (internal quotation marks omitted) (quoting *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 613 (1979)). Interestingly, in *Auburn*, the Ninth Circuit applied principles of conflict

preemption and found that the challenged ordinances were preempted under the Supremacy Clause (as opposed to preemption through private enforcement of section 253(a)). 260 F.3d at 1180.

Under the Supremacy Clause, the remedy is preemption. In contrast, assuming the existence of a private right of action under section 253, a successful plaintiff would be entitled to damages and attorney's fees. As explained by the court in *Berkeley*, it would be contrary to congressional intent to allow private enforcement of section 253 through section 1983:

> It seems highly unlikely that Senator Gorton's amendment, intended to shield local governments from overly burdensome scrutiny or new costs in their efforts to control their public rights-of-way, would simultaneously but silently create the ability of telecommunication providers and/or individual consumers to file suit against the local governments [in] federal court under section 253(c). Under the FTA, these private plaintiffs would potentially be entitled to damages and attorney's fees whereas the FCC is only entitled to preempt the challenged ordinance under subsection (d).

202 F. Supp. 2d at 1095-96.

There is no evidence of congressional intent, in the Act itself or the legislative history, to create a private right of action under section 253. Accordingly, the Court holds that section 253(a) cannot be enforced through section 1983, regardless of whether subsection (c) is poten-

tially implicated.[6] To the extent any prior orders of Judge Keep are inconsistent with this order, they are vacated.

This Court's holding is in harmony with the Supreme Court's decision in *Abrams*. In *Abrams*, the Supreme Court held that plaintiffs cannot enforce the limitations on local zoning authority set forth in section 332(c)(7) through section 1983. To the extent that actions may be brought under both section 332(c)(7) and section 253—i.e., actions challenging regulations underlying unfavorable decisions on the ground that they prohibit or have the effect of prohibiting service—finding the existence of a section 1983 claim for violation of section 253 would totally eviscerate the Supreme Court's holding.

Finally, the Court's preemption analysis in Section III.B-D, *supra*, remains unaffected. As already discussed, Sprint has a valid preemption claim under the Supremacy Clause.

---

[6] The Court disagrees with *Palm Beach* for the additional reason that its holding, while seeming reasonable in theory, is awkward to apply and would, in some instances, have nonsensical results. In this case, for example, the ordinance applies to public rights-of-way but it also applies to private property. Under the *Palm Beach* approach, it seems that Sprint would have a private right of action with respect to its section 253(a) claim because subsection (c) is potentially implicated to the extent that the ordinance applies to the public rights-of-way. However, it is not clear whether the section 1983 action would encompass the entire challenge to the ordinance, which would allow Sprint to recover damages for regulation beyond the public rights-of-way, or whether the 1983 action would be limited to the application of the ordinance to public rights-of-way, which would raise the question of how damages would be determined.

IV. Conclusion

For the reasons discussed above, Sprint's motion for partial summary judgment [46-1] is **GRANTED IN PART AND DENIED IN PART** and the County's motion for summary judgment, or, in the alternative, partial summary judgment [54-1; 54-2] is **GRANTED IN PART AND DENIED IN PART**. The Court grants summary judgment in favor of Sprint on its first cause of action for preemption by 47 U.S.C. § 253(a). The Court also grants summary judgment in favor of Sprint on its fourth cause of action for declaratory relief. The Court grants summary judgment in favor of the County on Sprint's third cause of action for violation of 42 U.S.C. § 1983.

The Court issues a declaratory judgment that Ordinance No. 9549 N.S., which amends the San Diego County Zoning Ordinance relating to wireless telecommunications facilities, is preempted 47 U.S.C. § 253(a). The Court also ORDERS that Defendants and their agents and employees, and any other persons acting on behalf of the County of San Diego, are permanently enjoined from enforcing the Ordinance.

The Clerk shall enter final judgment in favor of Sprint and against the County on Sprint's first and fourth causes of action and in favor of the County and against Sprint on Sprint's second and third causes of action.

IT IS SO ORDERED.

APPENDIX D

47 U.S.C. 253 provides:

Removal of barriers to entry

(a) In general

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) State regulatory authority

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) State and local government authority

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) Preemption

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a)

or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

(e) Commercial mobile service providers

Nothing in this section shall affect the application of section 332(c)(3) of this title to commercial mobile service providers.

(f) Rural markets

It shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214(e)(1) of this title for designation as an eligible telecommunications carrier for that area before being permitted to provide such service. This subsection shall not apply–

(1) to a service area served by a rural telephone company that has obtained an exemption, suspension, or modification of section 251(c)(4) of this title that effectively prevents a competitor from meeting the requirements of section 214(e)(1) of this title; and

(2) to a provider of commercial mobile services.

APPENDIX E

SAN DIEGO ZONING ORDINANCE

6980 WIRELESS TELECOMMUNICATIONS FACILITIES

(Added by Ord. No. 9549 (N.S.) adopted 4-30-03)

6981 CONFLICT RESOLUTION

Sections 6980 – 6991 are intended to be supplemental to the Zoning Ordinance. In case of conflict between the provisions represented in these sections and the provisions set forth in the Zoning Ordinance, the provisions of these sections shall apply.

(Added by Ord. No. 9549 (N.S.) adopted 4-30-03)

6982 PURPOSE

The purpose and intent of this Section is to provide a uniform and comprehensive set of standards for the development, siting and installation of wireless telecommunications facilities. These regulations are intended to protect and promote the public health, safety and welfare of the residents of the unincorporated areas of San Diego County and to preserve community character and protect aesthetic quality in accordance with the guidelines and intent of the Telecommunications Act of 1996 and to encourage siting in preferred locations to minimize aesthetic impacts and to minimize the intrusion of these uses into residential areas.

(Added by Ord. No. 9549 (N.S.) adopted 4-30-03)

6983 DEFINITIONS

For the purpose of the Wireless Telecommunications Facilities regulations contained in Sections 6980 through 6991, certain abbreviations, terms and words shall be

used, interpreted and defined as set forth in this Section. Unless the context clearly indicates to the contrary, words used in the present tense include the future tense and words used in the plural indicate the singular.

A. Administrative Site Plan – A Site Plan, pursuant to Sections 7150 through 7174 of this Ordinance, that does not require community review except as noted in Section 6987 A of this Ordinance.

Antenna – Any system of wires, poles, rods, reflecting discs or similar devices designed for telephonic, radio, facsimile, data or television communications through sending and/or receiving of electromagnetic waves when such system is either external to or attached to the exterior of a structure. Antennas shall include, but not be limited to, devices having active elements extending in any direction, and directional beam-type arrays having elements carried by and disposed from a generally horizontal boom that may be mounted up and rotated through a vertical mast or tower interconnecting the boom and antenna support, all of which elements are deemed to be part of the antenna.

Antenna Height – The vertical distance measured from the ground surface at grade to the tip of the highest point of the proposed structure.

Antenna Support – Any pole, telescoping mast, tower tripod or any other structure that supports a device used in the transmitting and/or receiving of electromagnetic waves.

Applicant – A person who applies for a wireless facility siting. An applicant can be the owner of the property or someone who is representing the

owner, such as a builder, developer, optional purchaser, lessor, consultant or architect.

C. Camouflaged – Any telecommunications facility that is designed to blend into the surrounding environment. Examples of camouflaged facilities may include architecturally screened roof-mounted antennas, building-mounted antennas painted to match the existing structure, antennas integrated into architectural elements, towers made to look like trees and antenna structures designed to look like light poles. Camouflaged facilities may be considered low or high visibility depending on the type of facility, degree of camouflaging and compatibility with the surrounding existing environment (see definitions of low and high visibility).

Co-location – Locating wireless telecommunications equipment from more than one provider on a single site.

Commercial Zones – are defined as consisting of the following zones: C32, C34, C35, C36, C37, C38, C40, C42, and C44, and also S88 when the proposed site is in a commercial component of a Specific Plan.

Community Character – Those unique attributes including, but not limited to, architecture, historical and cultural features, historical development patterns, landscape, hardscape and the size, scale and spacing of buildings and other structures that define a community's identity.

E. Equipment Building, Shelter or Cabinet – A cabinet or building used to house equipment used by telecommunication providers at a facility.

F. Facade Mounted Antenna – An antenna architecturally integrated into the facade of a building or structure.

Facility – See Wireless Telecommunications Facility.

Faux Trees – A term used to refer to Monopalms, Monopies and other camouflaged monopoles made to resemble different types of trees.

G. Grade – The lowest point of elevation of the finished surface of the ground, paving or sidewalk within the area between the structure and the property line or, when the property line is more than 5 feet from the structure, between the structure and a line 5 feet from the structure.

Guyed Tower – A telecommunications tower that is supported, in whole or in part, by guy wires and ground anchors.

H. High Visibility – The following shall be considered High Visibility facilities:

1) Monopoles, lattice towers and guyed towers

2) Non-camouflaged facilities

3) Faux Trees

4) Any and all wireless facilities not defined as invisible or low visibility.

High Voltage Transmission Tower – a tower carrying transmission lines of at least 132 kilovolts.

I. Industrial zones – are defined as consisting of the following zones: M50, M52, M54, M56, M58, and

also S88 when the proposed site is in an industrial component of a Specific Plan.

Invisible – Facilities, including, but not limited to towers, antennas and equipment cabinets and any other ancillary equipment, that cannot be seen from any street and from all adjacent properties and that do not result in any apparent architectural changes or additions, including Community Identification Signs when the antennas are fully integrated into the sign. The addition of landscaping, walls, fences or grading as screening techniques does not meet the definition of invisible.

L. Lattice Tower – A guyed or self-supporting three or four sided, open, steel frame support structure used to support telecommunications equipment.

Low Visibility – the following shall be considered Low Visibility facilities if they do not exceed the height schedule pursuant to Sections 4610 – 4620 of this Ordinance:

1) Whip antennas not exceeding six feet in length or height, including mounting, and measuring no more than 3 inches in diameter, located on existing structures including, but not limited to, water storage tanks, high-voltage transmission towers, utility towers and poles, sign standards, and roadway overpasses, if the addition, including any vertical mounting, does not result in an increase in height of the structure of more than 5 feet, and with equipment cabinets that are screened from view by means other than new walls or fences and have total dimensions no greater than 50 cubic feet and no dimension

greater than 6 feet. Cabinets in underground vaults are not included in the size calculation.

2) Panel-shaped antennas that are flush-mounted to an existing building facade or other existing structure on at least one edge, extend a maximum of 24 inches from the building facade or other structure at any edge, do not exceed the height of the building or other structure by more than five (5) feet and are designed to blend with the color and texture of the existing building or structure, with no equipment cabinet visible.

3) Facilities, including equipment cabinets, that are camouflaged from public view through the use of architectural treatments, such as cupolas, faux water towers, windmills or other structures and which are consistent with existing development and community character.

4) Additions to existing permitted low-visibility facilities if the additions themselves meet the definition of low visibility and are designed to minimize visibility of both the facility and equipment cabinets that have total dimensions no greater than 50 cubic feet and no dimension greater than 6 feet and are screened from view by means other than new walls and fences. The equipment cabinet may be larger if contained inside a structure consistent with the architecture and character of the site.

5) Changes to an existing building that are consistent with the building's architectural style and the equipment cabinet is not visible.

M. Monopalm – a monopole camouflaged to resemble a palm tree.

Monopine – a monopole camouflaged to resemble a pine tree.

Monopole – A wireless communication facility consisting of a single pole constructed without guy wires and ground anchors.

P. Panel Antenna – An antenna or array of antennas designed to concentrate a radio signal in a particular area. Also called directional antennas.

R. Residential Zones – for purposes of this section, are defined as consisting of the following zones: RS, RD, RR, RM, RV, RU, RMH, RRO, RC, S80, S87, S90, C30, C31, C46 and also S88 when the proposed site is in a residential component of a Specific Plan.

Roof Mounted Antenna – Any antenna with its support structure placed directly on the roof of any building or structure.

Rural Zones – are defined as consisting of the following zones; A70, A72 and S92.

S. Service Area – The area served by a single telecommunications facility.

Service Network – The telecommunications transmission system operated by a service provider in a community or jurisdiction.

Special Purpose Zones – are defined as consisting of the following zones: S82, S86 and S94.

T. Telecommunications – The transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

Telecommunications Tower – Any mast, pole, monopole, guyed tower, lattice tower, free standing tower or other structure designed and primarily used to support antennas.

Tower – See Telecommunications Tower.

W. Whip Antenna – An antenna that transmits signals in 360 degrees. Whip antennas are typically cylindrical in shape and are less than 3 inches in diameter and measure up to 6 feet in length, including the mounting. Also called omni-directional, stick or pipe antennas.

Wireless Community Master Plan – a Master Plan of preferred sites and designs for wireless facilities for a defined geographic area prepared in cooperation with one or more wireless service providers; formally submitted by the community planning group or sponsor group or by a homeowners association representing at least 4,000 residents and at least 5,000 acres to the Director of Planning and Land Use; reviewed by the Director for such issues as aesthetics and community compatibility; and following public review, approved by the Director. A Community Master Plan can be applicable to allproviders or to selected providers as defined in the Plan.

Wireless Telecommunications Facility - Any facility that transmits and/or receives electromagnetic waves, including, but not limited to, antennas, dish antennas and other types of equipment for the transmission or receipt of such signals, telecommunications towers or similar structures supporting said equipment, equipment buildings, parking area and other accessory development. Also known as a

wireless communications facility. This definition does not apply to Amateur Radio Stations as defined by the Federal Communications Commission, Part 97 of the Commission's Rules nor to N and radio transmission facilities.

(Added by Ord. 9549 (N.S.) adopted 4-30-03)

6984 APPLICATION REQUIREMENTS

In addition to meeting standard application submittal requirements for discretionary permits, all applicants for wireless telecommunications facilities shall provide 3 copies of the information listed below. One copy shall be distributed by the Department to the appropriate Planning or Sponsor Group. When a facility meets all requirements for processing under Tier 1, the requirements of Sections B and C 1 shall not be required. The Director of the Department of Planning and Land Use may waive any of the submittal requirements listed below or require additional information based upon specific project factors:

A. Geographic Service Area. Identify the geographic service area for the subject installation, including a map showing all the applicant's existing sites in the local service network associated with the gap the facility is meant to close. Describe how this service area fits into and is necessary for the company's service network.

B. Visual Impact Analysis. A visual impact analysis shall be provided showing the maximum silhouette, viewshed analysis, color and finish palette and proposed screening. The analysis shall include photo simulations and other information as necessary to determine visual impact of the facility. A map depicting

where the photos were taken shall be included.

C. Narrative.

1. Height. Show the height of the facility. Carriers must provide evidence that establishes that the proposed facilities have been designed to the minimum height required from a technological standpoint for the proposed site. If the tower will exceed the maximum permitted height limit, as measured from grade, a discussion of the physical constraints (topographical features, etc.) making the additional height necessary shall be required.

2. Maintenance. Describe the anticipated maintenance and monitoring program for the antennas, back-up equipment and landscaping.

3. Noise/Acoustical Information. As part of the Application for Environment Initial Study, provide manufacturer's specifications for all equipment such as air conditioning units and back-up generators, and a depiction of the equipment location in relation to adjoining properties.

4. If the site is not a preferred site as described in Section 6986, provide the information required in Section 6986 B.

5. Concept Landscape Plan. Provide a plan showing all proposed landscaping, screening and proposed irrigation with a discussion of how the chosen material at maturity will screen the site.

6. Fire Service. Provide evidence of compliance with Fire Policy FP-2 or a service letter from the applicable fire district.

7. Hazardous Materials. Listing of all hazardous materials to be used onsite.

8. For all applications for facilities located in the public right of way, include on the plot plan the location of parking for maintenance personnel.

9. A letter stating the applicant's willingness to allow other carriers to co-locate on their facilities wherever technically and economically feasible and aesthetically desirable.

10. The lease area of the proposed facility on the plot plan.

11. For all applications for wireless facilities operating below 1200 megahertz, submit a copy of the Federal Communications Commission Licensing Application Form 601, Main Form, Pages 1 through 4, Schedule A, Page 1, Schedule D, Page 1 and Schedule H, Pages 1 through 3. The application shall be reviewed by the Sheriff's Wireless Services Unit to determine potential interference with the Regional Communication System. Interference with that system may be grounds for denial.

(Added by Ord. No. 9549 (N.S.) adopted 4-30-03)

6985 APPLICATION PROCESSING

Although a tier may be assigned at project intake, a re-evaluation of the project tier may occur at any point in the process, including, but not limited to, review by the Planner, Environmental Analyst or Hearing Officer.

A. Applications will be processed based upon the following 4-tier permitting system, subject to the exceptions and general regulations found in Sections 6985 B

and C:

TIER 1 – ADMINISTRATIVE SITE PLAN

Facilities meeting any of the following criteria shall be processed as an ADMINISTRATIVE SITE PLAN:

Industrial and Commercial Zones

- Invisible facilities
- Facilities on:

  - CALTRANS structures, "cobra-style" streetlights and poles in the public right of way, or an existing park and ride light standard, when they meet all the following:

  - The antennas do not project more than 24 inches above the structure,

  - No more than a total of two antennas are located on a site

  - The equipment cabinet is no larger than 6 cubic feet.

  - The equipment cabinet is concealed from public view through the use of undergrounding or screening by means other than walls or fences.

- Façade mounted antennas integrated into the architecture in such a manner that no change to the architecture is apparent and no part of the facility can be seen from public view.

- Facilities not subject to the "B", "D", "H" or "J" Designators and are:

  - Hidden from public view through the use of architectural treatments (cupolas, etc.); and

- Consistent with the existing building and community character.

Any Zone

• Antennas located on high voltage transmission towers if they increase the bulk and scale of the structure by less than 5 percent.

TIER 2 – SITE PLAN WITH COMMUNITY REVIEW

Facilities meeting any of the following criteria shall be processed as a SITE PLAN WITH COMMUNITY REVIEW:

Commercial, Industrial and Special Purpose Zones

• Low visibility facilities.

All Zones

• Facilities covered by a Wireless Community Master Plan when the design and siting are consistent with the plan.

TIER 3 – MINOR USE PERMIT

Facilities meeting any of the following criteria shall be processed as a MINOR USE PERMIT:

• All facilities other than those meeting the criteria of Tiers 1, 2, or 4.

TIER 4 – MAJOR USE PERMIT

Facilities meeting the following criteria shall be processed as a MAJOR USE PERMIT:

- Non-camouflaged towers greater than 60 feet, or 15 feet above the maximum allowed height limit in the zone, whichever is lower, shall require a Major Use Permit in all zones (except where they are prohibited).
- All facilities in Residential and Rural zones except as specified in Tiers 1 and 2.

B. Exceptions

1. In addition to all other requirements in Sections 6980 through 6991, any proposed facility on a structure currently subject to a Major or Minor Use Permit shall obtain approval of the facility through the modification of the permit in accordance with Section 7378 of this Ordinance for a Use Permit or by Minor Deviation in accordance with Section 7609 of this Ordinance when the facility is invisible.

2. Major Use Permits for Wireless Telecommunications Facilities shall be under the original jurisdiction of the Planning Commission.

C. General Regulations

1. Non-camouflaged monopoles, lattice towers and guyed towers are prohibited in Residential and Rural zones.

2. All buildings and structures built to contain equipment accessory to a facility may not exceed 10 feet in height measured from the base of the foundation unless a greater height is necessary to maximize archi-

tectural integration and shall be screened by landscaping.

3. No more than three facilities are allowed on any site or parcel in commercial, industrial, rural or special purpose zones. No more than one facility is allowed on any parcel or site in a Residential zone. This requirement may be waived by the Director if a finding is made that co-location of more facilities is consistent with community character.

4. Telecommunications towers located adjacent to a residential use shall be set back from the nearest residential lot line by a distance at least equal to its total height or 50 feet, whichever is greater. The setback shall be measured from that part of the tower that is closest to the neighboring property (i.e., the setback for a faux tree would be measured from the end of the branch closest to the neighboring property).

5. No tower or equipment shall be located in a front, rear or side yard setback in any zone and no portion of any antenna array shall extend beyond the property lines.

6. Noise from any equipment supporting the facility shall meet the requirements of the County's Noise Ordinance on an average hourly basis.

7. The Director of Planning and Land Use may waive the requirements for a Site Plan pursuant to Section 7156 of this Ordinance if he finds that all of the purposes and requirements of the Site Plan have been or will be fulfilled by another discretionary permit, or where the Director finds the proposed development or improvement is minor in nature and the public purpose for which the Site Plan would normally be required will not be harmed by waiver of said requirement. Director's

decisions may be appealed pursuant to Section 7200 of the Zoning Ordinance.

8. All facilities located on a utility pole shall be promptly removed at the operator's expense at the time a utility is scheduled to be undergrounded.

9. Maintenance vehicles servicing facilities located in the public or private right of way shall not park on the traveled way or in a manner that would obstruct traffic.

10. Equipment cabinets and antenna structures shall be secured to disallow unauthorized access.

11. Use Permits for high visibility facilities shall have a maximum term of 6 years for facilities valued at less than $10,000; 10 years for facilities valued from over $10,000 to $500,000; and 15 years for facilities valued at $500,000 or more. This may be extended for an additional period of time by modifying the permit if it is found that no smaller or less visible technology is available or feasible to replace the facility.

12. As a condition of approval, prior to use of the facility, submit evidence, such as photos, to the satisfaction of the Director of Planning and Land Use to show proof that the facility is in conformance with photo simulations provided pursuit to Section 6984 (B) of this Ordinance.

(Added by Ord. No. 9549 (N.S.) adopted 4-30-03)

6986 PREFERRED SITES

A. The County has determined that certain zones and locations are preferable to others for siting wireless facilities due to aesthetics and land use compatibility.

1. The preferred zones are as follows:

PREFERRED ZONES	NON-PREFERRED ZONES
(a.) C32, C34, C35, C36, C37, C38, C40, C42, C44, M50, M52, M54, M56, M58, S82, S86, S94, and S88 when the facility would be located in a commercial or industrial component of the Specific Plan. (b.) Upon approval by the Director of Planning and Land Use of a Wireless Community Master Plan, the Preferred Zones for that defined geographic area shall be replaced by the locations shown in that Plan for the provider or providers covered by the plan.	All other zones.

2. The preferred locations are as follows:

PREFERRED LOCATIONS	NON-PREFERRED LOCATIONS
(a.) (1) Existing structures, including, but not limited to, water tanks, utility towers and poles, traffic lights, "cobra-style" street lights, and roadway overpasses in non-residential zones when the size and scale are compatible. (2) Commercial and industrial buildings.	All other locations.

(3) County or other government facilities (e.g., fire district buildings, road stations, freeway park and ride lots), excluding Elementary and Middle schools and County parks. (4) Co-location in zones other than residential to a total of three (3) towers each. (b.) Upon approval by the Director of Planning and Land Use of a Wireless Community Master Plan, the Preferred Locations for that defined geographic area shall be replaced by the locations shown in that plan for the provider or providers covered by the plan.	

B. Each application shall identify the zone and location preference that the proposed facility is meeting. If the proposed facility is not in a preferred zone identified in 6986 A (1) or if it is not in a preferred location identified in 6986 A (2), the applicant shall provide a map of the geographical area and a discussion of preferred sites that could potentially serve the same area as the proposed site and describe why each preferred site was not technologically or legally feasible. Facilities proposed to be located in County parks are excluded from this requirement when the Director of the Department of Parks and Recreation has issued a letter of concurrence.

C. Projects in a non-preferred zone or non-preferred location shall not be approved when siting in a preferred zone or preferred location is feasible unless a finding is

made that the proposed site is preferable due to aesthetic and community character compatibility.

(Added by Ord. No. 9549 (N.S.) adopted 4-30-03)

6987 DESIGN REGULATIONS

A. All applications at sites subject to a "H", "J", "B" or "D" design review designator shall also meet all requirements pursuant to Zoning Ordinance Sections 5700 – 5747 for "H" designators, 5749 for "J" designators, 5750 – 5799 for "B" designators or 5900 – 5910 for "D" designators.

B. All camouflaged facilities shall be designed to visually and operationally blend into the surrounding area in a manner consistent with community character and existing development. The facility shall also be appropriate for the specific site (i.e., it should not "stand out" from its surrounding environment, such as a faux tree standing alone in a field or standing at a greater height (five feet or more) than other trees on the site).

C. No facility shall be allowed on any building or structure, or in any district, that is listed or eligible for listing on any Federal, State or local historical register unless it is determined by the Historic Site Board that the facility will have no adverse effect on the appearance of the building or structure or its eligibility for historic designation. No change in architecture nor High Visibility facility is permitted on any such building, any such site or in any such district.

D. In cases where the facility site is visible from "Official", "First", "Second" or "Third" Priority Scenic Highways, as identified in the General Plan, the facility shall be designed and located in such a manner as to avoid adverse visual impacts. Such locations shall use

design methods such as, but not limited to, type of facility, camouflaging, screening and landscaping. No monopoles, lattice towers or guyed towers are permitted

E. Façade-mounted antennas shall be architecturally integrated into the building design and otherwise made as unobtrusive as possible. If possible, antennas should be located entirely within an existing or newly created architectural feature so as to be completely screened from view. Façade-mounted antennas shall not extend more than 24 inches out from the building face.

F. All facilities shall be designed to minimize the visual impact to the greatest extent feasible by means of placement, screening, landscaping with native species, whenever feasible, and camouflage, and to be compatible with existing architectural elements, building materials and other site characteristics. The applicant shall use the least visible antennas possible to accomplish the coverage objectives.

G. Colors and materials for facilities shall be nonreflective and chosen to minimize visibility. Facilities, including support equipment and buildings, shall be painted or textured using colors to match or blend with the primary background. All cabinets visible to the public shall be treated with a graffiti-resistant coating.

H. Beacon lights shall not be included in the design of facilities unless required by the Federal Aviation Administration and shall be included when calculating the height of the facility.

I. No High Visibility facility, including ancillary support equipment, may be located between the face of a building and a public street, bikeway, trail or park.

J. No signs, striping, graphics or other attention getting devices are permitted on the transmission tower or ancillary facilities except for warning and safety signage with a surface area of no more than three square feet. Such signage shall be affixed to a fence or ancillary facility and the number of signs is limited to no more than two unless a greater number is required by law.

K. All high visibility facilities shall be sited in such a manner as to cause the least detriment to the viewshed of adjoining properties.

L. Roof mounted antennas shall be constructed at the minimum height possible to serve the operator's service area and shall be set back as far from the edge of the building as possible or otherwise screened to minimize their visibility.

M. No net loss in required parking spaces shall occur as a result of the installation of any wireless telecommunications facility.

N. Cabinets and other equipment shall not impair pedestrian use of sidewalks or other pedestrian pathways, nor inhibit equestrian activities on designated public or private trail systems and shall be screened from the sidewalk by landscaping, undergrounding or other means, excluding new wails and fences.

O. In cases where the facility site is visible from a County park or is proposed to be located in a County Park, the facility shall be designed and located in such a manner as to avoid adverse visual impacts. Such locations shall use design methods such as, but not limited to, type of facility, camouflaging, screening and landscaping. No monopoles, lattice towers or guyed towers are permitted.

P. The use of chain link fences for security of equipment is permitted if the fence is fully screened by landscaping. No razor wire or barbed wire is permitted. Slats do not satisfy the requirement for screening.

Q. Site lighting shall be kept to a minimum in every instance, shall be shielded to direct the light downward, shall be controlled by a manual switch or timed switch of no greater than one hour's duration and shall not be used except when nighttime maintenance is necessary.

R. No facility sited on a ridgeline or hilltop shall be approved unless the facility blends with the surrounding existing and man-made environment to the maximum extent possible and a finding is made that no other location is feasible.

(Added by Ord. No. 9549 (N.S.) adopted 4-30-03)

6988 MAINTENANCE

A. All graffiti on any components of the facility shall be removed promptly in accordance with County regulations. Graffiti on any facility in the public right-of-way must be removed within 48 hours of notification.

B. All landscaping shall be maintained at all times and shall be promptly replaced if not successful.

C. If a flagpole is used for camouflaging a facility, flags must be flown and must be properly maintained at all times.

D. All wireless telecommunications sites shall be kept clean and free of litter.

E. All equipment cabinets shall display a legible operator's contact number for reporting maintenance problems.

(Added by Ord. No. 9549 (N.S.) adopted 4-30-03)

6989 ABANDONMENT OR DISCONTINUATION OF USE

A. All operators who intend to abandon or discontinue the use of any wireless telecommunications facility shall notify the County of such intentions no less than 60 days prior to the final day of use.

B. Wireless telecommunications facilities with use discontinued shall be considered abandoned 90 days following the final day of use.

C. All abandoned facilities shall be physically removed by the facility owner no more than 90 days following the final day of use or of determination that the facility has been abandoned, whichever occurs first.

D. The County reserves the right to remove any facilities that are abandoned for more than 90 days at the expense of the facility owner.

E. Any abandoned site shall be restored to its natural or former condition. Grading and landscaping in good condition may remain.

(Added by Ord. No. 9549 (N.S.) adopted 4-30-03)

6990 REVOCATION

Failure to comply with any condition of approval or standard in this ordinance shall constitute grounds for possible revocation of use pursuant to Sections 7174, 7380 and 7382 of the Zoning Ordinance.

(Added by Ord. No. 9549 (N.S.) adopted 4-30-03)

6991 AMORTIZATION OF HIGH VISIBILITY FACILITIES IN RESIDENTIAL AND RURAL ZONES

Notwithstanding any other sections regulating wireless facilities, all facilities defined as "high visibility" by this ordinance, and located in a Residential or Rural Zone shall be brought into conformance with this ordinance under the following amortization schedule. The time allowed shall be measured from the effective date of this ordinance. The Director may extend the amortization period upon a showing of economic hardship to the owner.

Fair Market Value on Effective Date	Minimum Years Allowed
Under $10,000	6
$10,000 - $500,000	10
Over $500,000	15

(Added by Ord. No. 9549 (N.S.) adopted 4-30-03)

Supreme Court, U.S.
FILED
FEB 11 2009
OFFICE OF THE CLERK

No. 08-759

In The Supreme Court of the United States

SPRINT TELEPHONY PCS, L.P.,
a Delaware limited partnership,

Petitioner,

v.

COUNTY OF SAN DIEGO, a division of the State of California; GREG COX, in his capacity as a supervisor of the County of San Diego; DIANNE JACOB, in her capacity as a supervisor of the County of San Diego; PAM SLATER-PRICE, in her capacity as a supervisor of the County of San Diego; RON ROBERTS, in his capacity as a supervisor of the County of San Diego; and BILL HORN, in his capacity as a supervisor of the County of San Diego,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOHN J. SANSONE, County Counsel
COUNTY OF SAN DIEGO
THOMAS D. BUNTON, Senior Deputy*
1600 Pacific Highway, Room 355
San Diego, California 92101-2469
(619) 531-6456
Attorneys for Respondents

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does 47 U.S.C. section 253(a) apply to regulations that govern the construction of individual wireless facilities?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
BRIEF IN OPPOSITION	1
INTRODUCTION/SUMMARY OF ARGUMENT	1
STATEMENT OF THE CASE	4
A. Proceedings In The District Court	5
B. Proceedings In The Ninth Circuit	14
C. Proceedings In This Court	18
ARGUMENT	18
I. THE CIRCUIT SPLIT THAT SPRINT "IDENTIFIES" DOES NOT EXIST	18
A. The Ninth Circuit Did Not Acknowledge The Circuit Split Identified By Sprint	22
B. Cases From The First And Tenth Circuits As Well As Prior Cases From The Ninth Circuit Did Hold That Regulations That "May" Or "Might" Prohibit An Entity From Providing Service Were Preempted	27
II. THIS CASE IS A POOR VEHICLE FOR RESOLVING THE ALLEGED CIRCUIT SPLIT	31

TABLE OF CONTENTS – Continued

Page

A. Section 253(a) Does Not Apply At All ... 31

B. If The Standard Sprint Advocates Were Specifically Applied To The Ordinance, It Would Not Be Preempted Under Section 253(a)..... 36

C. In Any Event, The Ordinance Is Not Facially Invalid 38

CONCLUSION..... 40

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Edwards, 514 U.S. 143 (1995) 39

California Coastal Commission v. Granite Rock Co., 480 U.S. 572 (1987).....38

City of Auburn v. Qwest Corp., 260 F.3d 1160 (9th Cir. 2001) .....*passim*

In re California Payphone Ass'n, 12 F.C.C.R. 14191 (1997).....19

Level 3 Communications v. City of St. Louis, 477 F.3d 528 (8th Cir. 2007) 23, 27

Level 3 Communications, L.L.C. v. City of St. Louis, 540 F.3d 794 (8th Cir. 2008) 24

P.R. Telegraph Co. v. Municipality of Guayanilla, 450 F.3d 9 (1st Cir. 2006).....24, 26

Qwest Communications v. City of Berkeley, 433 F.3d 1253 (9th Cir. 2006) 24, 29, 30

Qwest Corp. v. City of Portland, 385 F.3d 1236 (9th Cir. 2004) 7, 28, 29

Qwest Corp. v. City of Santa Fe, 380 F.3d 1258 (10th Cir. 2004) 25, 26

Sprint Spectrum L.P. v. City of Carmel, 361 F.3d 998 (7th Cir. 2003) 32

Sprint Telephony PCS, L.P. v. County of San Diego, 311 F.Supp.2d 898 (S.D. Cal. 2004).....6

Sprint Telephony PCS, L.P. v. County of San Diego, 377 F.Supp.2d 886 (S.D. Cal. 2005).....*passim*

TABLE OF AUTHORITIES – Continued

Page

Sprint Telephony PCS, L.P. v. County of San Diego, 479 F.3d 1061 (9th Cir. 2007) 14

Sprint Telephony PCS, L.P. v. County of San Diego, 490 F.3d 700 (9th Cir. 2007) 15

Sprint Telephony PCS, L.P. v. County of San Diego, 527 F.3d 791 (9th Cir. 2008) 15

Sprint Telephony PCS, L.P. v. County of San Diego, 543 F.3d 571 (9th Cir. 2008) ..... *passim*

TCG N.Y., Inc. v. City of White Plains, 305 F.3d 67 (2d Cir. 2002) 25

United States v. Salerno, 481 U.S. 739 (1987) 38

Verizon Communications, Inc. v. FCC, 535 U.S. 467 (2002) 21, 22

CONSTITUTION AND STATUTES

U.S. Const. amend XIV 5, 6

42 U.S.C. section 1983 ..... *passim*

42 U.S.C. section 1988 5

47 U.S.C. section 251(c) 21

47 U.S.C. section 253(a) ..... *passim*

47 U.S.C. section 253(c) 5, 6

47 U.S.C. section 332(c)(7) 31, 32, 33, 34

47 U.S.C. section 332(c)(7)(A) 31, 33, 34

47 U.S.C. section 332(c)(7)(B) 32, 33

47 U.S.C. section 332(c)(7)(B)(i)(II) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

47 U.S.C. section 332(c)(7)(B)(iii).....37

47 U.S.C. section 332(c)(7)(B)(v).....33, 35

MISCELLANEOUS

County of San Diego Ordinance No. 9459
section 1.....4

County of San Diego Zoning Ordinance

section 6983(C).....11

section 6984.....9

section 6984(c)(9).....8

section 6985(A).....4, 5

section 6985(C)(1).....11

section 6987(F).....1

section 7150.....5

sections 7150-7172.....5

section 7166(f).....12

sections 7354-7388.....5

section 7356.....12

section 7358.....9, 10

section 7362.....11

section 7366.....5

section 7366(h).....12

section 7382.....12

section 7703.....12

TABLE OF AUTHORITIES – Continued

Page

H.R. Conf. Rep. No. 104-458 at 208 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 222 32

H.R. Rep. No. 104-204 at 94 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 60 32

http://www.dof.ca.gov/research/demographic/reports/estimates/e-1_2006-07/documents/E-1 table.xls 4

BRIEF IN OPPOSITION

Respondents County of San Diego, Greg Cox, Dianne Jacob, Bill Horn, Ron Roberts, and Pam Slater-Price (collectively the "County") submit this Opposition to the Petition for a Writ of Certiorari filed by Sprint Telephony PCS, L.P. ("Sprint").

INTRODUCTION/SUMMARY OF ARGUMENT

In an attempt to "create" a circuit split that does not exist, Sprint asserts that the Ninth Circuit held that "a state or local regulation that does not expressly prohibit the provision of telecommunications service is preempted by 47 U.S.C. [section] 253(a)[1] only if it effects a complete ban on the provision of service." (Sprint Petition at 12.)[2] Sprint contends that this purported interpretation of section 253(a) conflicts with decisions from other courts finding regulations that "materially inhibit" or "substantially impede" an entity from providing service preempted by section 253(a). (*Id.* at 13.)

Sprint's assertion is simply wrong. The Ninth Circuit never held that a regulation must completely ban telecommunications service in order to be preempted by section 253(a). Rather, consistent with

[1] Section 253(a) was enacted as part of the Telecommunications Act of 1996 (the "TCA").

[2] Unless otherwise indicated, all statutes referenced are contained in Title 47 of the United States Code.

section 253(a)'s plain language,[3] the Ninth Circuit held that a regulation must "prohibit or have the effect of prohibiting" an entity from providing service in order to be preempted. The Ninth Circuit did not further define the phrase "have the effect of prohibiting," but it cited examples of regulations that would have this impact. Those examples make it plain that the Ninth Circuit does not require that a regulation impose a "complete ban" for it to be preempted under section 253(a).

Since the circuit split identified by Sprint does not exist, this Petition should be denied.

Moreover, even if the circuit split existed, this case would be a poor vehicle for resolving the split. First, section 253(a) does not even apply to the County's Ordinance. The Ordinance regulates the construction of individual wireless facilities. The TCA contains a specific and exclusive provision that governs such ordinances – section 332(c)(7)(B)(i)(II). Therefore, the Ordinance would not be preempted even if the Court were to resolve the purported circuit split in the manner requested by Sprint.

Further, even if the Court were to adopt the "materially inhibit" or "substantially impede" standards advocated by Sprint, the outcome of this case

---

[3] Section 253(a) provides that "[n]o . . . local . . . regulation . . . may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

would not change.[4] Sprint has pointed to no provision of the County's Ordinance that has materially inhibited or substantially impeded its ability to provide service. Moreover, the County submitted undisputed evidence that the Ordinance has not had this effect. Between the effective date of the Ordinance and when the County filed its summary judgment papers in the district court, the County granted four of the nine permit applications Sprint submitted to build wireless facilities. The other five applications were pending. Since the County granted Sprint's permit applications, there is ample evidence that the Ordinance has not materially inhibited or substantially impeded Sprint's ability to provide service.

Further, Sprint has mounted a facial challenge to the County's Ordinance. Therefore, Sprint must show that the Ordinance will have the requisite prohibitory effect in all circumstances. Sprint cannot make this showing even if the Court were to adopt the "materially inhibit" or "substantially impede" standards advocated by Sprint. Since the County has granted Sprint's permit applications applying the Ordinance,

---

[4] Sprint asserts that the First, Second, and Tenth circuits "have held that a state or local regulation is preempted by 47 U.S.C. [section] 253(a) if it ***substantially impedes*** an entity from providing telecommunications service." (Sprint Petition at 13) (emphasis added.) However, none of those circuits have even used the phrase "substantially impedes" in analyzing section 253(a) claims.

the Ordinance does not prohibit Sprint from providing service in all circumstances.

STATEMENT OF THE CASE

In April 2003, the County enacted Ordinance Number 9549 (the "Ordinance") governing the siting of wireless facilities. The Ordinance is part of the County's Zoning Ordinance. The Ordinance was enacted to "prescribe clear, reasonable and predictable criteria to assess and process application[s] in a consistent and expeditious manner, while reducing visual and land use impacts associated with wireless telecommunications facilities." (Excerpts of the Record ("ER") at 135, §1.) The Ordinance applies to all proposed wireless facilities in the unincorporated area[5] of the County, including those located on private property as well as those located within the County-owned rights-of-way. (*Id.*)

The Ordinance establishes four tiers. (*Id.* at 141-143, §6985(A).) A proposed wireless facility is

[5] Sprint notes that San Diego County is the sixth most populous county in the United States, with a population of nearly three million. Sprint fails to note, however, that the Ordinance only governs the unincorporated areas within the County, not the areas within incorporated cities. The California Department of Finance reports that the population of the unincorporated County was only 491,764 as of January 1, 2008. http://www.dof.ca.gov/research/demographic/reports/estimates/e-1_2006-07/documents/E-1table.xls

assigned to a tier based upon the location and type of facility involved. (*Id.*) A provider must obtain some type of permit from the County before it can build any wireless facility in the County. (*Id.*) The Zoning Ordinance establishes different names for the conditional use permits, such as administrative site plan, major use permit and minor use permit. (County's Supplemental Excerpts of the Record ("CER") at 23, §7150; *id.* at 37, §7366.) The use permit types, procedures (public hearings and appeals), placement of conditions on the grant of a use permit, and penalties for violating the terms of a use permit are part of the County's general zoning regulations that apply to all permit applications, not just applications for wireless facilities. (*Id.* at 23-31, §§7150-7172; *id.* at 32-45, §§7354-7388.)

A. Proceedings In The District Court.

On July 15, 2003, Sprint filed this lawsuit against the County alleging four causes of action. (*Id.* at 1-15.) Sprint's first cause of action alleged that the Ordinance, on its face, is preempted by section 253(a). Sprint's second cause of action alleged that the Ordinance violates section 253(c) and the Fourteenth Amendment to the United States Constitution. Sprint's third cause of action alleged that the Ordinance violates 42 U.S.C. section 1983. Sprint's fourth cause of action sought a declaratory judgment. Sprint also sought an order enjoining the County from enforcing its Ordinance as well as damages and attorneys' fees (under 42 U.S.C. §1988). This case was

assigned to United States District Court Judge Judith N. Keep. (ER at 25.)

On September 9, 2003, the County filed a motion to dismiss Sprint's complaint. On October 20, 2003, the district court granted the motion in part, and denied the motion in part. (*Id.* at 17-25.) The district court granted the County's motion to dismiss Sprint's second cause of action for violation of section 253(c) and the Fourteenth Amendment. The district court dismissed Sprint's section 253(c) claim without leave to amend. The district court dismissed Sprint's Fourteenth Amendment claim, with leave to amend. (*Id.* at 24.) Sprint did not amend that claim. (*Id.* at 180.)

On November 17, 2003, the County filed a motion for judgment on the pleadings. On January 5, 2004, in a published decision, the district court granted the County's motion in part, and denied the motion in part. *Sprint Telephony PCS, L.P. v. County of San Diego*, 311 F.Supp.2d 898 (S.D. Cal. 2004). The court dismissed Sprint's damages claim against the individual members of the County's Board of Supervisors. In all other respects, the district court denied the County's motion. The district court ruled that Sprint could recover damages and attorneys' fees under 42 U.S.C. section 1983 if it could show that the County's Ordinance was preempted by section 253(a).

Following Judge Keep's death, this case was reassigned to United States District Court Judge Barry Ted Moskowitz. (ER at 67.)

Thereafter, the parties filed cross-motions for summary judgment. In its moving papers, the County argued that, as a threshold matter, Sprint's action failed because section 332(c)(7)(B)(i)(II), not section 253(a), applies to facial challenges to zoning ordinances that govern the construction of individual wireless facilities. Alternatively, the County argued that none of the Ordinance provisions "prohibit or have the effect of prohibiting" Sprint from providing service in violation of section 253(a).

On July 8, 2005, the district court issued a ruling on the parties' cross-motions for summary judgment. In a published decision, the district court found that certain provisions of the Ordinance were preempted by section 253(a) and that those provisions could not be severed from the remainder of the Ordinance. *Sprint Telephony PCS, L.P. v. County of San Diego*, 377 F.Supp.2d 886, 895-900 (S.D. Cal. 2005). Therefore, the district court enjoined the County from enforcing the Ordinance. *Id.* at 900. The district court also found that Sprint could not recover damages or attorneys' fees under 42 U.S.C. section 1983 because section 253(a) does not create a private right of action. *Id.* at 900-903.

The district court began its decision by finding that Sprint could bring its facial challenge to the Ordinance under either section 332(c)(7)(B)(i)(II) or section 253(a). *Id.* at 891-892. Turning to the substance of Sprint's preemption claim, the district court cited the Ninth Circuit's decisions in *City of Auburn* v. *Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), and *Qwest*

Corp. v. City of Portland, 385 F.3d 1236 (9th Cir. 2004), for the proposition that "[s]ection 253(a) does not only preempt regulations that actually prohibit the provision of telecommunications services, but also preempts those that 'may . . . have the effect of prohibiting' the provision of such services." *Id.* at 893 (citations omitted) (ellipses in original.) Applying this standard, the district court found that several provisions of the Ordinance, "in combination" had the requisite prohibitory effect. *Sprint Telephony*, 377 F.Supp.2d at 893-899.

The County will identify each of the Ordinance provisions the district court found preempted in turn. The Ordinance requires an entity applying for a permit to construct a wireless facility to submit "[a] letter stating the applicant's willingness to allow other carriers to co-locate on their facilities wherever technically and economically feasible and aesthetically desirable." (ER at 141, §6984(c)(9).) The district court found that "[t]he requirement that applicants state their willingness to co-locate is unreasonable because it is unclear what the terms and conditions of co-location would be (e.g., whether the applicant would receive fair compensation)."[6] *Sprint Telephony*, 377 F.Supp.2d at 895.

---

[6] The County argued that this provision only requires an applicant to state whether it is willing to allow another wireless provider to locate a facility on the provider's existing facilities. The answer could be no. The Ninth Circuit did not explicitly address the County's argument in any of its opinions.

The Ordinance also authorizes the Director of the County's Department of Planning and Land Use (the "Director") to exempt a wireless provider from submitting the information normally required from applicants, and to "require additional information ***based upon specific project factors***." (ER at 140, §6984) (emphasis added.) The district court found that "[t]he provision that applicants provide 'any additional information' that may be required is overbroad. No limit is placed on what and how much additional information the Director may require." *Sprint Telephony*, 377 F.Supp.2d at 895.

Section 7358 of the County's Zoning Ordinance specifies the findings that must be made in order to grant all Major or Minor Use Permit applications (not just those for wireless facilities). Section 7358 provides in relevant part as follows:

> a. That the location, size, design, and operating characteristics of the proposed use will be compatible with adjacent uses, residents, buildings, or structures, with consideration given to:
>
> 1. Harmony in scale, bulk, coverage and density;
>
> 2. The availability of public facilities, services and utilities;
>
> 3. The harmful effect, if any, upon desirable neighborhood character;

> 4. The generation of traffic and the capacity and physical character of surrounding streets;
>
> 5. The suitability of the site for the type and intensity of use or development which is proposed; and to
>
> 6. Any other relevant impact of the proposed use; and
>
> b. That the impacts, as described in paragraph "a" of this section, and the location of the proposed use will be consistent with the San Diego County General Plan.
>
> c. That the requirements of the California Environmental Quality Act have been complied with.

(ER at 118-119, §7358.)

The district court concluded that under these standards, the County has "unfettered discretion" in deciding whether to grant a permit application. *Sprint Telephony*, 377 F.Supp.2d at 895. According to the district court, "the decision-maker can consider anything bearing on 'compatibility,' a subjective and hard-to-define standard in itself. Similarly, considerable discretion may also be exercised in determining whether the proposed facilities are 'camouflaged,'

'consistent with community character,' and have minimal 'visual impact.'" *Id.* (citation omitted.)[7]

Section 7362 of the Zoning Ordinance also gives the County authority to grant use permits with conditions:

> Use permits may be granted or modified subject to the performance of such conditions, including the provision of required improvements, . . . [which are] deem[ed] to be reasonable and necessary or advisable under the circumstances so that the objectives of the Zoning Ordinance shall be achieved.

(ER at 121, §7362.)

The district court found it unacceptable and a violation of section 253(a) that "the Director can impose whatever conditions the Director finds appropriate to further the stated purpose of the Zoning Ordinance, which includes the broad goals of public health, safety and welfare, preservation of community character and aesthetic quality, and minimization of

---

[7] The Ordinance prohibits "non-camouflaged monopoles, lattice towers and guyed towers" in residential and rural zones. (ER at 143 §6985(C)(1).) It requires a provider to obtain a Major Use Permit for other "non-camouflaged towers." (*Id.*, Tier 4.) The Ordinance also provides that "[a]ll facilities shall be designed to minimize the visual impact to the greatest extent feasible by means of placement, screening, landscaping with native species, whenever feasible, and camouflage. . . ." (*Id.* at 146-147, §6987(F).) The Ordinance specifically defines "camouflaged" and "community character." (*Id.* at 136, §6983(C); 137, §6983(C).)

intrusion into residential areas." *Sprint Telephony*, 377 F.Supp.2d at 895-896.

The Zoning Ordinance also requires public hearings where citizens can express their views whether the County's appointed and elected officials should grant a use permit for a wireless facility. (ER at 28, §7166(f); at 33, §7356; at 38, §7366(h).) The district court found "that there is nothing wrong with public hearings per se. However, here, there are no provisions restricting what can be discussed at the public hearings. The lack of restrictions on what types of objections or concerns can be raised at hearings . . . " renders the public hearing requirement preempted. *Sprint Telephony*, 377 F.Supp.2d at 896.

Finally, the Ordinance contains provisions that allow the County to enforce conditions that may be placed on a use permit. Those provisions authorize County officials to (1) modify or revoke a use permit following a hearing, and (2) file an action in court seeking civil or criminal penalties against those entities that violate use permit conditions. (ER at 43, §7382, at 46-48, §7703.) The district court noted that

> violation of a condition imposed solely in the discretion of the appropriate authority carries adverse consequences. The permit may be revoked or modified. Furthermore, any person violating any condition of a use permit shall be deemed guilty of a misdemeanor unless, in the discretion of the prosecutor, it is charged as an infraction.

Sprint Telephony, 377 F.Supp.2d at 896 (citation omitted.) The district court found that these provisions were preempted, without explanation. *Id.*

The district court found that all other provisions of the Ordinance were not preempted by section 253(a). However, the district court found that the preempted provisions of the Ordinance could not be severed from the non-preempted provisions. *Id.* at 899-900. Therefore, the district court enjoined the County from enforcing the entire Ordinance. *Id.* Judge Moskowitz also vacated Judge Keep's prior ruling that a plaintiff could state a claim under 42 U.S.C. section 1983 based on a section 253(a) violation. Judge Moskowitz concluded that there is no private right of action to enforce section 253(a) and therefore that provision cannot be enforced through 42 U.S.C. section 1983. *Id.* at 900-903. Judgment was entered on July 12, 2005. (ER at 179.)

On July 25, 2005, the County filed a Motion for Reconsideration/Motion to Alter Judgment or, in the Alternative, Motion for Stay Pending Appeal. On September 2, 2005, the district court denied the County's motion in its entirety. (*Id.* at 184-188.) In doing so, the district court reiterated its prior determination that a plaintiff bringing a facial challenge to an ordinance governing the construction of individual wireless facilities could proceed under either section 332(c)(7)(B)(i)(II) or section 253(a): "The County erroneously asserts that the Court concluded that facial challenges are not permitted under section 332(c)(7)(B)(i)(II). Actually, the Court recognized that there may be circumstances where facial challenges

may be brought under section 332(c)(7)(B)(i)(II). However, the Court found that nothing in section 332 precludes facial challenges under section 253(a)." (ER at 185 n.1) (citations omitted.)

B. Proceedings In The Ninth Circuit.

On July 14, 2005, Sprint filed a Notice of Appeal, appealing the district court's ruling in the County's favor on Sprint's 42 U.S.C. section 1983 claim. (*Id.* at 182-183.) On September 8, 2005, the County filed a Notice of Appeal, appealing the district court's ruling that the Ordinance is preempted by section 253(a). (CER at 93-94.)

On September 13, 2005, the County filed a motion in the Ninth Circuit seeking a stay of the district court's order enjoining the County from enforcing the Ordinance. On October 14, 2005, the Ninth Circuit granted the County's motion for a stay. (*Id.* at 96-97.)

On March 13, 2007, a three judge panel consisting of Eighth Circuit Senior Judge Myron H. Bright, Ninth Circuit Senior Judge A. Wallace Tashima and Ninth Circuit Judge Carlos T. Bea filed a published opinion affirming the district court's decision in all respects. *Sprint Telephony PCS, L.P. v. County of San Diego*, 479 F.3d 1061 (9th Cir. 2007).

On April 3, 2007, the County filed a Petition for Rehearing and Petition for Rehearing *En Banc*. On June 13, 2007, the three judge panel issued an amended opinion which did not change the result in

the case. *Sprint Telephony PCS, L.P. v. County of San Diego*, 490 F.3d 700 (9th Cir. 2007). The panel also denied the County's Petition for Rehearing and indicated that no more petitions for panel rehearing could be filed. The panel denied the Petition for Rehearing *En Banc*, without prejudice.

On June 27, 2007, the County filed a second Petition for Rehearing *En Banc*. On May 14, 2008, the Ninth Circuit granted the County's Petition. *Sprint Telephony PCS, L.P. v. County of San Diego*, 527 F.3d 791 (9th Cir. 2008). On June 24, 2008, oral argument was held in front of the *en banc* panel, which consisted of Ninth Circuit Chief Judge Alex Kozinski, Ninth Circuit Judges Andrew J. Kleinfeld, Michael Daly Hawkins, Sidney R. Thomas, Barry G. Silverman, Susan P. Graber, Ronald M. Gould, Marsha S. Berzon, Richard C. Tallman, Jay S. Bybee and Ninth Circuit Senior Judge A. Wallace Tashima, who was a member of the original three judge panel. On September 11, 2008, the *en banc* panel issued a unanimous published decision finding that no part of the Ordinance is preempted by section 253(a). *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008) (*en banc*). The *en banc* panel also affirmed the ruling by the district court and the three judge panel that damages and attorneys' fees are not available under 42 U.S.C. section 1983 for a violation of section 253(a). *Id.* at 580-581.

The *en banc* panel held that a plaintiff alleging a claim under section 253(a) must show that a regulation prohibits or has the effect of prohibiting an entity

from providing service. *Id.* at 578. The Ninth Circuit overruled its prior cases holding that the mere possibility that a regulation would prohibit an entity from providing service was enough to establish a violation of section 253(a). *Id.* at 577-579.

The Ninth Circuit concluded that "[o]n the face of the Ordinance, none of the requirements, individually or in combination, prohibits the construction of sufficient facilities to provide wireless services to the County of San Diego." *Id.* at 579-580. The Ninth Circuit specifically rejected Sprint's argument that the retention of discretion to grant or deny a permit application (and to impose conditions) was an effective prohibition. According to the Ninth Circuit,

> [a] certain level of discretion is involved in evaluating any application for a zoning permit. It is certainly true that a zoning board *could* exercise its discretion to effectively prohibit the provision of wireless services, but it is equally true (and more likely) that a zoning board would exercise its discretion only to balance the competing goals of an ordinance – the provision of wireless services and other valid public goals such as safety and aesthetics.

Id. at 580 (emphasis added.)

The Ninth Circuit stated that

> [t]he same reasoning applies to Sprint's complaint that the Ordinance imposes detailed application requirements and requires public hearings. Although a zoning board could

> conceivably use these procedural requirements to stall applications and thus effectively prohibit the provision of wireless services, the zoning board equally could use these tools to evaluate fully and promptly the merits of an application.

Id.

The Ninth Circuit also indicated that it was

> equally unpersuaded by Sprint's challenges to the substantive requirements of the Ordinance. Sprint has not identified a single requirement that effectively prohibits it from providing wireless services. On the face of the Ordinance, requiring a certain amount of camouflage, modest set-backs, and maintenance of the facility are reasonable and responsible conditions for the construction of wireless facilities, not an effective prohibition.

Id.

In addition to joining the unanimous *en banc* opinion, Judge Ronald M. Gould wrote a one paragraph concurring opinion. Judge Gould stated that

> [z]oning ordinances, in my view, will be preempted only if they would substantially interfere with the ability of the carrier to provide such services. Cases of a preempted zoning ordinance will doubtless be few and far between, and the record in this case shows that telecommunication services here were not effectively barred by the zoning ordinance.

Id. at 581 (Gould, J., concurring) (emphasis added.)

C. Proceedings In This Court.

On December 10, 2009, Sprint filed its Petition for a Writ of Certiorari. On December 22, 2009, the Court issued an order extending the time for the County to file an opposition to the Petition until February 11, 2009.

ARGUMENT

I

THE CIRCUIT SPLIT THAT SPRINT "IDENTIFIES" DOES NOT EXIST

In an effort to create a non-existent circuit split, Sprint repeatedly asserts that the Ninth Circuit held that "a state or local regulation that does not expressly prohibit the provision of telecommunications service is preempted by 47 U.S.C. [section] 253(a) only if it effects a complete ban on the provision of service." (Sprint Petition at 12.) Sprint is simply wrong. The Ninth Circuit applied the plain meaning of the phrase "prohibit or have the effect of prohibiting" as used in section 253(a), and never interpreted that phrase as outlawing only "complete bans." Since the Ninth Circuit did not adopt the standard that Sprint asserts creates an inter-circuit split, the Petition should be denied.

Based on section 253(a)'s plain language, the Ninth Circuit held that "a plaintiff must establish either an outright prohibition or an effective prohibition on the provision of telecommunications services;

a plaintiff's showing that a locality could *potentially* prohibit the provision of telecommunications services is insufficient." *Sprint Telephony*, 543 F.3d at 579 (emphasis in original.) The Ninth Circuit specifically recognized that "our interpretation is consistent with the [Federal Communications Commission's ("FCC")]." *Id.* at 578. In support of this statement, the Ninth Circuit quoted the FCC's decision in *In re California Payphone Ass'n*, 12 F.C.C.R. 14191, 14209 (1997), where the FCC determined that "to be preempted by § 253(a), a regulation 'would have to actually prohibit or effectively' prohibit the provision of services." *Id.* In *In re California Payphone Ass'n*, the FCC elaborated on the "has the effect of prohibiting" language used in section 253(a), stating that in determining whether an ordinance has this effect, it "consider[s] whether the Ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *Id.* at 14206. Since the Ninth Circuit cited the FCC's decision approvingly and that decision adopts a "materially inhibits" standard for showing effective prohibition, it is clear that the Ninth Circuit did not hold that only complete bans can amount to an effective prohibition.

Applying the "prohibit or have the effect of prohibiting" standard, the Ninth Circuit found that "[t]he Ordinance plainly is not an outright ban on wireless facilities. We thus consider whether the Ordinance effectively prohibits the provision of wireless facilities. We have no difficulty concluding that it does not." *Sprint Telephony*, 543 F.3d at 579. According to the

Ninth Circuit, "Sprint has not identified a single requirement that effectively prohibits it from providing wireless services." *Id.* at 580.

The Ninth Circuit never equated an "effective prohibition" with a "complete ban." The Ninth Circuit provided ***examples*** of ordinance provisions that would "have the effect of prohibiting" wireless services. Some of those examples make it plain that the court believed that if enacted, these provisions would "have the effect of prohibiting service" even though they were not a "complete ban" on wireless services. For instance, the Ninth Circuit stated that "Sprint has pointed to no requirement that, on its face, demonstrates that Sprint is effectively prohibited from providing wireless services. For example, the Ordinance does not impose an excessively long waiting period that would amount to an effective prohibition." *Id.* An "excessively long waiting period" is not a complete ban on the provision of wireless services. The wireless company will be able to provide service, just not immediately. Nonetheless, the Ninth Circuit concluded that an Ordinance that imposed an "excessively long waiting period" would be an effective prohibition.

The Ninth Circuit also noted that "[w]e have held previously that rules effecting a 'significant gap' in service coverage could amount to an effective prohibition, and we have no reason to question that holding." *Id.* (citation omitted.) Sprint states that "such a coverage gap would be tantamount to a complete ban, insofar as the carrier would be unable to provide any service in the area of the 'gap' (and would

be unable to provide adequate service to the surrounding area.)" (Sprint Petition at 16 n.5.) Sprint is mistaken. Ordinance provisions that create a significant gap in coverage would not ban wireless companies from providing service within a jurisdiction such as the County. Rather, those provisions would limit the provider's ability to provide service within a certain part of the jurisdiction. This is certainly not a "complete ban" on wireless service.

The premise of Sprint's argument is simply incorrect. The Ninth Circuit never concluded an "effective prohibition" occurs only if a regulation imposes a "complete ban" on wireless services. Indeed, the examples provided by the Ninth Circuit demonstrate that the court understood that regulations that do not rise to a complete ban can have the effect of prohibiting an entity from providing service. Therefore, the Ninth Circuit's decision does not conflict with the decisions of the First, Second and Tenth circuits holding that regulations that "materially inhibit" an entity from providing service are preempted.[8]

---

[8] Citing *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 491 (2002), Sprint asserts that "[a]s this Court has already (if implicitly) recognized, however, the text of Section 253(a) comfortably accommodates an interpretation under which any regulation that ***substantially impedes*** an entity from providing telecommunications service is preempted." (Sprint Petition at 17-18) (emphasis added.) In *Verizon Communications*, the Court stated that "the 1996 Act prohibits state and local regulation that impedes the provision of 'telecommunications service,' § 253(a), and obligates incumbent carriers to allow competitors to enter their local markets. § 251(c)." 535 U.S. at 491 (footnote

(Continued on following page)

A. The Ninth Circuit Did Not Acknowledge The Circuit Split Identified By Sprint.

Sprint asserts that the Ninth Circuit acknowledged that its opinion created a split with the First, Second and Tenth circuits. (Sprint Petition at 2.) However, the difference between the circuits that the Ninth Circuit noted is not the same as the purported circuit split identified by Sprint. In this case, the Ninth Circuit rejected its prior interpretation of section 253(a) that a regulation that "may or might possibly" prohibit a telecommunications company from providing service is preempted. In doing so, the Ninth Circuit overruled its prior decision in *City of Auburn* (and subsequent Ninth Circuit cases that followed *City of Auburn*), which had adopted that interpretation.

> In its opinion, the Ninth Circuit noted that in
>
> *Auburn*, we became one of the first federal circuit courts to interpret [section 253(a)]. We surveyed district court decisions and adopted their broad interpretation of its preemptive effect. In the course of doing so, we quoted § 253(a) somewhat inaccurately,

---

omitted.) Since the interpretation of section 253(a) was not an issue in *Verizon Communications*, the statement that Sprint cites is pure *dicta*. Moreover, Sprint does not explain the difference, if any, between the "materially inhibit" standard adopted by the FCC and explicitly followed by the First, Second and Tenth circuits and the "substantially impedes" standard advanced by Sprint.

> inserting an ellipsis in the text of § 253(a). We held that section 253(a) preempts regulations that not only prohibit outright the ability of any entity to provide telecommunications services, but also those that may have the effect of prohibiting the provision of such services.

Sprint Telephony, 543 F.3d at 576 (internal quotation marks, ellipses and citations omitted.)

However, the Ninth Circuit recognized in this case that Congress did not intend to preempt regulations that "may" or "might" have the effect of prohibiting service. According to the court,

> [i]n context, it is clear that Congress' use of the word "may" works in tandem with the negative modifier "[n]o" to convey the meaning that "state and local regulations shall not prohibit or have the effect of prohibiting telecommunications service." Our previous interpretation of the word "may" as meaning "might possibly" is incorrect. We therefore overrule *Auburn* and join the Eighth Circuit[9] in holding that "a plaintiff suing a

---

[9] The Ninth Circuit explicitly followed the Eighth Circuit's interpretation of section 253(a) in *Level 3 Communications v. City of St. Louis*, 477 F.3d 528, 532-33 (8th Cir. 2007). According to the Ninth Circuit, "[r]ecently, the Eighth Circuit rejected the *Auburn* standard and held that, to demonstrate preemption, a plaintiff must show actual or effective prohibition, rather than the mere possibility of prohibition." *Sprint Telephony*, 543 F.3d at 577 (internal quotation marks and citations omitted.) In a subsequent decision, the Eighth Circuit affirmed the district

(Continued on following page)

> municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition."

Id. at 578 (citation omitted.) Stated another way, the Ninth Circuit held that "a plaintiff must establish either an outright prohibition or an effective prohibition on the provision of telecommunications services; a plaintiff's showing that a locality could *potentially* prohibit the provision of telecommunications services is insufficient." *Id.* at 579.

The Ninth Circuit cited cases from three other circuits that had followed *City of Auburn*'s "broad interpretation of § 253(a), albeit with little discussion." *Id.* at 577.[10] Those cases were: *P.R. Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir.

---

court's grant of summary judgment in favor of the City of St. Louis. *Level 3 Communications, L.L.C. v. City of St. Louis*, 540 F.3d 794 (8th Cir. 2008). Level 3 has filed a Petition for a Writ of Certiorari, which is currently pending with this Court. United States Supreme Court Case No. 08-626.

[10] None of these cases involved challenges to ordinances that regulate the construction of individual wireless facilities. The cases involved the validity of franchise fees charged by local governments for the use of rights-of-way by land line telephone companies. The Ordinance does not require wireless providers to pay rent or franchise fees to locate their facilities within the County's rights-of-way. Moreover, this is the first case in which a circuit court has considered whether an ordinance that regulates the construction of individual wireless facilities is preempted by section 253(a). Since no circuit split exists on the issue of whether ordinances that give local governments discretion to deny applications for wireless facilities are preempted by section 253(a), Sprint's Petition should be denied for this additional reason.

2006); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1270 (10th Cir. 2004); and *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67 (2d Cir. 2002).[11] It is apparent that the Ninth Circuit was referring to the "may" or "might possibly" prohibit standard that the court adopted in *City of Auburn*.

In *City of Santa Fe*, the Tenth Circuit held that

> [s]ection 253(a) bars any legal requirement which ***may have the effect*** of prohibiting

---

[11] In *City of White Plains*, the Second Circuit did not directly discuss or rely on the Ninth Circuit's interpretation of section 253(a). It did not cite a Ninth Circuit case in the portion of its opinion interpreting section 253(a). The Second Circuit correctly held that an ordinance must prohibit or have the effect of prohibiting an entity from providing service in order to violate section 253(a). 305 F.3d at 76. However, the Second Circuit misapplied that standard by concluding that discretion to deny an application alone is an effective prohibition. *Id.* This is consistent with the Ninth Circuit's prior interpretation of the scope of section 253(a) in *City of Auburn*.

In any event, *City of White Plains* is distinguishable because that case challenged the city's discretion to deny a "franchise" to a landline telephone company. If an entity is denied a franchise, it cannot operate anywhere within the municipality. The franchise decision is a single up/down vote that determines the ability of an entity to provide service. The County's Ordinance, on the other hand, governs the construction of individual wireless facilities. If a permit application is denied under the Ordinance, Sprint will be able to continue using its existing facilities to provide service and will be able to submit another application for the same facility, perhaps at a different location or using a different design. Thus, the denial of a permit application under the Ordinance does not have anywhere near the same potential for a prohibitory effect as the denial of a franchise.

> the ability of an entity to provide telecommunications service. Thus, the provision [giving discretion to the city to decide whether to enter into a lease agreement] is undoubtedly prohibitive because the city ***can use it*** to outright deny leases to a telecommunications carrier.

380 F.3d at 1270 n.9 (emphasis added.)[12] Thus, it is clear that the Tenth Circuit was following *City of Auburn*'s "may" or "might" standard. Since discretion can be exercised to say both "no" and "yes" to a permit application, there cannot be an effective prohibition unless section 253(a) prohibits ordinances that "may" or "might" be used to prohibit an entity from providing service.

In *Municipality of Guayanilla*, the First Circuit also stated that "[s]ection 253(a) preempts laws that 'may prohibit or have the effect of prohibiting' the provision of telecommunications services." 450 F.3d at 18.[13] This is the same interpretive error that the Ninth Circuit made in *City of Auburn*.[14] Under its

---

[12] As discussed above, the Ninth Circuit rejected Sprint's argument that the retention of discretion alone is enough to prove that an ordinance is an effective prohibition. *Sprint Telephony*, 543 F.3d at 580.

[13] In *Municipality of Guayanilla*, the First Circuit did not cite *City of Auburn* or any other Ninth Circuit case to support its interpretation of section 253(a). Indeed, elsewhere in the opinion, the First Circuit appeared to acknowledge that a regulation "must prohibit or have the effect of prohibiting" to be preempted under section 253(a). 450 F.3d at 18.

[14] The Eighth Circuit has stated that "[b]y inserting the word 'that' before 'may'" the First Circuit in *Guayanilla*,

(Continued on following page)

plain language, section 253(a) only preempts laws that "prohibit or have the effect of prohibiting" the provision of telecommunication services.

This circuit split – to the extent it exists – is irrelevant because Sprint does not contend that *City of Auburn*'s "may" or "might" standard should be adopted by this Court. Indeed, Sprint states that the "proposition that Section 253(a) preempts regulations that either 'actually prohibit or effectively prohibit' the ability to provide [telecommunications] service . . ." is "unobjectionable." (Sprint Petition at 19.) Nor could Sprint make this argument because the "may" or "might" standard is contrary to the plain language of section 253(a).

B. Cases From The First And Tenth Circuits As Well As Prior Cases From The Ninth Circuit Did Hold That Regulations That "May" Or "Might" Prohibit An Entity From Providing Service Were Preempted.

Sprint asserts that

> [t]he Ninth Circuit criticized those decisions that had adopted a broader construction of Section 253(a) (including its prior decision in *City of Auburn*) on the ground that they attached excessive significance to the provision's use of the word "may." In so reasoning, however, the Ninth Circuit was attacking a

---

"distorted" the "most precise meaning of section 253(a)." *Level 3 Communications*, 477 F.3d at 533.

> strawman. Neither the *City of Auburn* [decision] nor the decisions of other circuits placed substantial weight on the use of the word "may"; instead, those decisions merely sought to give meaning to the successive phrase "have th effect of prohibiting."

(Sprint Petition at 18-19.)

Sprint is wrong on both counts. Those decisions improperly read "may" as allowing courts to preempt regulations that "might possibly" prohibit an entity from providing service. Further, those decisions gave significance to the phrase "have the effect of prohibiting" by inserting the word "may" in front of the phrase so that ordinances that might possibly have the effect of prohibiting an entity from providing service were preempted. However, section 253(a) only preempts ordinances that "have the effect of prohibiting an entity from providing service." The Ninth Circuit did not attack a strawman – it corrected a serious misinterpretation of section 253(a).

As discussed above, in *City of Auburn* the Ninth Circuit adopted an incorrect test for determining whether a regulation is preempted under section 253(a). The Ninth Circuit expanded on this test in *City of Portland*, 385 F.3d at 1239-1241. There, the court first repeated the holding from *City of Auburn* that section 253(a) preempts "regulations that not only prohibit outright the ability of any entity to provide telecommunications services, but also those that 'may . . . have the effect of prohibiting the provision of such services.'" 385 F.3d at 1239 (citation

omitted) (ellipsis in original.) Moreover, the "may prohibit" test was directly responsible for resolution of that case. The district court had rejected the plaintiff's section 253(a) challenge because "Qwest has not pointed to a single telecommunications service that it, or any other entity, is effectively prohibited from providing because of the Cities' revenue-based fees or any of the other challenged requirements." *Id.* at 1241 (internal quotation marks and citations omitted.) In reversing, the Ninth Circuit stated that

> [w]e do not agree that Qwest was required to make an actual showing of "a single telecommunications service that it . . . is effectively prohibited from providing." We have previously ruled that regulations that *may* have the effect of prohibiting the provision of telecommunications services are preempted. Like it or not, both we and the district court are bound by our prior ruling.

Id. (emphasis in original.)

Similarly, in *Qwest Communications v. City of Berkeley*, 433 F.3d 1253 (9th Cir. 2006),

> [t]he City argue[d] Qwest failed to produce any facts showing how any section or combination of sections of Ordinance 6630 does what § 253(a) precludes – prohibiting or having the effect of prohibiting telecommunications services. Specifically, the City contends that Qwest must show the actual impact of Ordinance 6630 on Qwest's ability to provide telecommunications services.

Id. at 1256. The Ninth Circuit rejected that argument, asserting that "rather than considering the actual impact of Ordinance 6630, we must determine whether the specific regulations of Ordinance 6630 'may have the effect of prohibiting the provision of telecommunications services' in the City. As explained below, the regulations of Ordinance 6630 have that prohibiting effect." *Id.* at 1256-1257 (citations omitted.)

The First and Tenth circuits also gave substantive meaning to the word "may" and held that regulations that possibly could "have the effect of prohibiting" an entity from providing service were preempted. Therefore, the Ninth Circuit was correct in holding that only regulations that "prohibit or have the effect of prohibiting" a company from providing service are preempted by section 253(a).

Because Sprint does not ask this Court to resolve the circuit split identified by the Ninth Circuit and because it is clear that only regulations that prohibit or have the effect of prohibiting an entity from providing service are preempted, this Petition should be denied.[15]

---

[15] Indeed, since the Ninth Circuit has recently abandoned the "may" or "might" standard and the Eighth Circuit has also rejected that standard, it is likely that the First and Tenth circuits will follow suit.

II

THIS CASE IS A POOR VEHICLE FOR RESOLVING THE ALLEGED CIRCUIT SPLIT

Even if a circuit split existed, this case presents a poor vehicle for reviewing the alleged split. First, section 253(a) does not apply to regulations that govern the construction of individual wireless facilities. Second, even if the "materially inhibit" or "substantially impede" standards were explicitly applied to the Ordinance, it would not be preempted by section 253(a). Third, Sprint challenged the Ordinance on its face. The undisputed facts establish that the Ordinance does not have the effect of prohibiting Sprint from providing service under all circumstances.

A. Section 253(a) Does Not Apply At All.

As Sprint acknowledges, there is a threshold question whether section 253(a) applies here. Sprint is challenging the Ordinance, which regulates the construction of individual wireless facilities. There is a specific provision within the TCA that governs such ordinances. Section 332(c)(7). That provision provides as follows:

> (7) **Preservation of local zoning authority**
>
> (A) General authority
>
> Except as provided in this paragraph, nothing in this chapter shall limit or affect

> the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.
>
> (B) Limitations
>
> (i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof –
>
> (I) shall not unreasonably discriminate among providers of functionally equivalent services; and
>
> (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.[16]

---

[16] On pages three and twenty-three of its Petition, Sprint cites the House Report for the TCA commenting on a provision contained in the House bill dealing with the siting of wireless facilities. Under the House bill, the FCC was required "to prescribe a national policy for the siting of commercial mobile radio services facilities." H.R. Rep. No. 104-204 at 94 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 60. The House bill, however, did not become law. The Conference Committee rejected the house proposal, instead choosing to preserve local government authority over the siting of wireless facilities. H.R. Conf. Rep. No. 104-458 at 208 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 222. *Sprint Spectrum L.P. v. City of Carmel*, 361 F.3d 998, 1003 (7th Cir. 2003) ("As the Conference Committee explained: 'The conference agreement creates a new [§332(c)(7)] which prevents [FCC] preemption of local and State land use decisions and preserves the authority of State and local governments over zoning and land use matters except in the limited circumstances

(Continued on following page)

Section 332(c)(7)(A) specifically states that "[e]xcept as provided in this paragraph, nothing in this ***chapter*** shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." (Emphasis added.) Sections 253(a) and 332(c)(7)(B) are part of the same chapter – Chapter 5, Wire or Radio Communication. Since the Ordinance governs the "placement, construction, and modification of personal wireless service facilities," section 253(a) does not apply to the Ordinance under the plain language of the TCA. Congress intended section 332(c)(7)(B) to be the exclusive limitation on this type of local government regulation and did not intend section 253(a)'s general provisions to trump section 332(c)(7)(B).

"The district court . . . held that facial challenges to a local government's wireless regulations could be brought under either § 253(a) or § 332(c)(7). . . ." *Sprint Telephony*, 543 F.3d at 575. On appeal, the County argued that the district court erred and that section 253(a) was inapplicable. The Ninth Circuit did not consider this question: "[B]ecause Sprint's suit hinges on the statutory text that we interpreted above – 'prohibit or have the effect of prohibiting' – we need not decide whether Sprint's suit falls under

---

set forth in the conference agreement.'") (citation omitted) (for the exception see section 332(c)(7)(B)(v)). Therefore, the portion of the House Report cited by Sprint is simply irrelevant.

§ 253 or § 332. As we now hold, the legal standard is the same under either." *Id.* at 579.

Sprint asserts that the district court was wrong and that it could bring this lawsuit only under section 253(a). According to Sprint, "Section 253(a) applies to challenges to 'statutes' and 'regulations' . . . , whereas Section 332(c)(7) applies only to challenges to particular 'decisions' made by local authorities." (Sprint Petition at 26 n.7.) However, section 332(c)(7)(B)(i)(II) specifically provides that "[t]he ***regulation*** of the placement, construction, and modification of personal wireless service facilities by any State or local government . . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services." (Emphasis added.) Thus, by its plain terms, section 332(c)(7)(B)(i)(II) also applies to regulations. Further, in section 332(c)(7)(B)(i)(II), Congress sought to preserve "local government zoning authority." Congress understood that zoning authority is contained in zoning ordinances. Congress also understood that zoning decisions are made pursuant to zoning ordinances. Therefore, section 332(c)(7)(B)(i)(II) would apply here. Since section 332(c)(7)(B)(i)(II) applies, section 253(a) does not apply. Section 332(c)(7)(A).

Sprint claims that "one of the central promises of the Telecommunications Act [was] that wireless providers can offer services free of intrusive and inconsistent state and local regulation. . . . " (Sprint Petition at 29). Sprint is mistaken. The House bill would have created uniform national standards for

the siting of wireless facilities. However, the House's approach was rejected in favor of the current law which preserves local authority over the siting of wireless facilities. Congress understood that local zoning ordinance provisions will vary from municipality to municipality and from state to state.

Sprint also asserts that this Court would not need to reach the question of whether section 253(a) applies here. Sprint is incorrect. The Ninth Circuit did not reach this question because it assumed that section 253(a) applied, but concluded that the Ordinance was not preempted under that section. If the Ninth Circuit had concluded that the County's Ordinance was preempted under section 253(a), it would have needed to reach the threshold issue of section 253(a)'s applicability because there is a 30-day statute of limitations for section 332(c)(7)(B)(i)(II) claims. Section 332(c)(7)(B)(v). If only section 332(c)(7)(B)(i)(II) applies to the Ordinance because it governs the construction of individual wireless facilities, Sprint's lawsuit is time barred.[17] Therefore, this Court will also need to reach this threshold question in order to resolve Sprint's preemption challenge.

---

[17] Sprint filed its complaint 46 days after the Ordinance became effective. (ER at 1; 151-152.)

B. If The Standard Sprint Advocates Were Specifically Applied To The Ordinance, It Would Not Be Preempted Under Section 253(a).

Sprint asserts that "[t]he question presented in this case – *i.e.*, whether Section 253(a) preempts a state or local regulation that substantially impedes the provision of telecommunications service – is a recurring one. . . ." (Sprint Petition at 21.) Deciding whether a given regulation "substantially impedes" the provision of telecommunications service necessarily involves a fact intensive analysis of the regulation being challenged as well as an examination of the facts showing whether the regulation has had a real world impact on an entity's ability to provide telecommunications service. The Court should decline Sprint's invitation to engage in this fact intensive inquiry.

Moreover, if the "materially inhibit" or "substantially impede" standards were explicitly applied (the Ninth Circuit implicitly applied the "materially inhibit" standard) to the Ordinance, it would not be preempted under section 253(a). The Ninth Circuit had no trouble concluding that the Ordinance does not effectively prohibit Sprint from providing service and Sprint has offered no explanation why any of the Ordinance provisions materially inhibit or substantially impede its ability to provide service.

Indeed, how does holding a public hearing on a permit application prohibit an entity from providing service? Allowing the public to have its say does not

mean that a permit application will be denied. Assuming that the district court was correct and the Ordinance requires wireless providers to share existing facilities, this provision also does not prohibit an entity from providing service. Rather, it makes more locations available from which wireless companies can provide additional service. The fact that the County can require additional information does not mean that it will be burdensome for a company to provide the additional information requested. Similarly, the authority to impose conditions does not mean that a provider will have difficulty complying with the conditions. Authority to revoke a use permit (following a hearing) and to file a lawsuit against a company that does not comply with the conditions of its permit does not effectively prohibit an entity from providing service. The wireless company will have full due process rights and will only suffer negative consequences if it failed to satisfy a condition that was designed to protect the public. Finally, discretion to deny a permit application alone does not prohibit an entity from providing service because that discretion can be exercised to grant a permit application. Indeed, Congress specifically acknowledged that local governments have the authority to deny applications to install individual wireless facilities. Section 332(c)(7)(B)(iii) ("Any decision by a State or local government . . . ***to deny*** a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.") (emphasis added.)

Further, Sprint challenged the County's Ordinance on its face, providing no evidence regarding the impact of the Ordinance. The County, however, provided undisputed evidence showing that it had granted four of the nine permit applications Sprint submitted between the time the Ordinance was enacted and the County moved for summary judgment in the district court. (CER at 50, ¶ 4.) The other five Sprint permit applications were still pending. (*Id.*) Given these undisputed facts, the Ordinance could not have "materially inhibited" "substantially impeded" or "had the effect of prohibiting" Sprint from providing service.

C. In Any Event, The Ordinance Is Not Facially Invalid.

Sprint alleged that the Ordinance violates section 253(a) on its face. Sprint did not allege, and did not provide any evidence that the Ordinance, as applied, has "prohibited or had the effect of prohibiting" it from providing service. In *United States v. Salerno*, 481 U.S. 739, 745 (1987), this Court held that "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." In *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572, 580 (1987), the Court held that the "no set of circumstances" test applies to

facial statutory preemption challenges. *See also Anderson v. Edwards*, 514 U.S. 143, 155 n.6 (1995).[18]

Thus, even if the Court were to adopt Sprint's proposed "substantially impedes" test, it would make no difference to the outcome of this case because Sprint cannot show that in all circumstances the County will exercise its discretion to deny Sprint's applications and therefore will under all circumstances substantially impede its ability to provide service.

Indeed, as discussed above, Sprint challenged the County's Ordinance on its face, providing no evidence regarding the impact of the Ordinance. The County, however, offered undisputed evidence showing that the County had granted four out of the nine permit applications Sprint submitted between the time the Ordinance was enacted and the County moved for summary judgment in the district court. (CER at 50, ¶ 4.) The other five Sprint permit applications were still pending. (*Id.*) The undisputed evidence also showed that the County had not denied a single application to construct a wireless facility submitted by any entity since the Ordinance was enacted. (*Id.* at ¶ 3.) Given these undisputed facts, it is evident that

---

[18] Sprint argues that a plaintiff bringing a facial challenge under section 253(a) should not be required to show that a regulation will be invalid under all circumstances. Sprint, however, offers no persuasive reason why a statute containing an express preemption clause should be exempt from the "no set of circumstances" test.

there are circumstances in which the Ordinance can be applied in a manner that does not have the effect of prohibiting Sprint from providing service. Therefore, the Ordinance is not facially invalid.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

DATED: February 11, 2009.

JOHN J. SANSONE,
County Counsel

THOMAS D. BUNTON,
Senior Deputy

Attorneys for Respondents

130

FILED
JUN 9 - 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 08-759

In the Supreme Court of the United States

SPRINT TELEPHONY PCS, L.P., PETITIONER

v.

COUNTY OF SAN DIEGO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONER

DANIEL T. PASCUCCI
NATHAN R. HAMLER
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.
3580 Carmel Mountain Road, Suite 300
San Diego, CA 92130
(858) 314-1500

KANNON K. SHANMUGAM
Counsel of Record
THOMAS J. ROBERTS
SARAH F. TEICH
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000

TABLE OF CONTENTS

Page

A. There is a deep and substantial conflict on the interpretation of Section 253(a) 2

B. This case is an ideal vehicle in which to resolve the circuit conflict 8

TABLE OF AUTHORITIES

Cases:

In re California Payphone Association, 12 F.C.C.R. 14,191 (1997) 4, 7, 8

City of Auburn v. *Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), cert. denied, 534 U.S. 1079 (2002) 3, 5, 6

Level 3 Communications, L.L.C. v. *City of St. Louis*, 477 F.3d 528 (8th Cir. 2007) 4, 10

National Cable & Telecomms. Association v. *Brand X Internet Services*, 545 U.S. 967 (2005) 7

Puerto Rico Telephone Co. v. *Municipality of Guayanilla*, 450 F.3d 9 (1st Cir. 2006) 6

Qwest Corp. v. *City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004) 5, 6

TGC New York, Inc. v. *City of White Plains*, 305 F.3d 67 (2d Cir. 2002), cert. denied, 538 U.S. 923 (2003) 5, 6

United States v. *Salerno*, 481 U.S. 739 (1987) 8

Statutes and ordinances:

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ..... 1, 11

47 U.S.C. 253(a) ..... *passim*

47 U.S.C. 253(d) 7, 8

47 U.S.C. 332(c)(7) 9, 10

San Diego County Zoning Ordinance:

§ 7358(a)(6) 5

Page

Miscellaneous:

CTIA—The Wireless Association, Petition for Declaratory Ruling, WT Docket No. 08-165 (F.C.C. filed July 11, 2008) 8

In the Supreme Court of the United States

No. 08-759

SPRINT TELEPHONY PCS, L.P., PETITIONER

v.

COUNTY OF SAN DIEGO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONER

In response to the Court's invitation, the government has filed a most peculiar brief. The government concedes that there is a circuit conflict concerning the interpretation of 47 U.S.C. 253(a)—one of the central provisions of the Telecommunications Act of 1996. The government further contends that the Ninth Circuit erred to the extent that it held that a regulation is preempted under Section 253(a) only if it effects a complete ban on the provision of telecommunications service. And the government does not dispute that this case presents an issue of enormous practical significance to the telecommunications industry in general and the wireless industry in particular.

In light of those propositions, one might reasonably expect that the government would recommend that the

Court grant review in this case. Yet the government recommends denial, primarily on the grounds that the circuit conflict could be more substantial and that the Federal Communications Commission could eliminate the conflict. While the Court ordinarily (and appropriately) affords deference to the government's bottom-line recommendations, it should not do so where, as here, the supporting justifications are so threadbare. This case presents a clear and expressly recognized circuit conflict on an issue of great significance, and it is an optimal vehicle for resolution of that conflict. The Court should therefore grant review and reverse the Ninth Circuit's seriously flawed decision.

A. There Is A Deep And Substantial Conflict On The Interpretation Of Section 253(a)

1. The government correctly concedes that there is a circuit conflict concerning the interpretation of Section 253(a). See Br. 15 (stating that "[t]he Eighth and Ninth Circuits correctly recognized that their view of the Section 253(a) preemption standard differs in some respects from that of the First, Second, and Tenth Circuits"). The government nevertheless contends that resolution of that conflict is not warranted at this time because the conflict is "not sufficiently settled or stark." Br. 9. That contention is wrong in each respect.

a. With regard to the government's contention that the conflict is insufficiently "stark": that contention lacks merit, because the Ninth Circuit's interpretation of Section 253(a) simply cannot be squared with, and is considerably narrower than, the interpretations of the First, Second, and Tenth Circuits, all of which (unlike the Ninth Circuit) have expressly adopted the FCC's "materially inhibits" standard.

As a preliminary matter, the government concedes that "[p]ortions of the Ninth Circuit's decision * * * could be read to suggest that a Section 253 plaintiff must show effective preclusion—rather than simply material interference—in order to prevail." Br. 14. Significantly, the government also concedes that, to the extent the Ninth Circuit's opinion is so read, the resulting legal standard would be erroneous, because such an "unduly narrow understanding of Section 253(a)'s preemptive scope" "would frustrate the policy of open competition that Section 253 was intended to promote." Br. 8, 14. Not only do some "portions" of the Ninth Circuit's opinion support that reading, but that reading is comfortably the better one of the opinion as a whole. In the decision under review, the Ninth Circuit adopted a "narrow" interpretation of Section 253(a), see Pet. App. 11a, and repudiated its earlier decision in *City of Auburn* v. *Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), cert. denied, 534 U.S. 1079 (2002), which had recognized that a regulation could be preempted by Section 253(a) if it "created a substantial . . . barrier" to the provision of telecommunications service, Pet. App. 8a-9a (quoting *City of Auburn*, 260 F.3d at 1176).[1]

Notwithstanding the foregoing language, the government suggests, in a model of studied qualification, that the Ninth Circuit's decision "can reasonably be understood to reflect a mode of analysis that is consistent with the FCC's interpretation." Br. 14. That is incor-

---

[1] In addition, all of the Ninth Circuit's examples of hypothetical regulations that would be preempted under its standard would be tantamount to complete bans on the provision of service. See, *e.g.*, Pet. App. 16a (positing regulations requiring that "all [wireless] facilities be underground" or that "no wireless facilities be located within one mile of a road"); see also Reply Br. 3 (discussing additional example).

rect. As a logical matter, the Ninth Circuit's standard cannot be reconciled with the FCC's standard, because a provision that merely "created a substantial . . . barrier" to the provision of telecommunications service (and therefore is not preempted under the Ninth Circuit's new standard) would surely "materially inhibit[]" the provision of service (and therefore be preempted under the FCC's standard). And the Ninth Circuit expressly repudiated the decisions of the First, Second, and Tenth Circuits, which unambiguously embraced the FCC's standard as their own (and thus held that a regulation that "materially inhibits" the provision of telecommunications service is preempted). See Pet. App. 9a.[2] Far from merely failing to "expressly adopt the [FCC's] 'existing material interference' test" (Br. 14), therefore, the Ninth Circuit necessarily rejected that test altogether.[3]

In any event, even if the Ninth Circuit's standard stops short of preempting only regulations that effect a complete ban, the Ninth Circuit would uphold a substantial array of regulations that would be preempted under

---

[2] As the government notes (Br. 13-14), the Eighth Circuit also expressly embraced the FCC's standard, though it appears to have applied that standard more stringently in some respects than the First, Second, and Tenth Circuits. See *Level 3 Communications, L.L.C.* v. *City of St. Louis*, 477 F.3d 528, 532-533 (2007), petition for cert. pending, No. 08-626 (filed Nov. 7, 2008).

[3] The government errs by arguing that the Ninth Circuit must have adopted the FCC's "materially inhibits" standard simply because it cited *In re California Payphone Association*, 12 F.C.C.R. 14,191 (1997), in which the FCC first articulated that standard. See Br. 14. The Ninth Circuit wholly ignored the operative language in *California Payphone Association* adopting the "materially inhibits" standard, and instead cited that ruling merely for the generic proposition that Section 253(a) preempts regulations that "actually prohibit or effectively prohibit" the ability to provide telecommunications service. Pet. App. 11a.

the standards of the First, Second, and Tenth Circuits. To verify that proposition, one need look no further than this case. The Wireless Ordinance gives San Diego County the unfettered discretion to grant or deny an application for most wireless facilities based on "[a]ny * * * relevant impact of the proposed use." Zoning Ord. § 7358(a)(6). At least two other circuits—and the Ninth Circuit under its preexisting standard—have held that Section 253(a) preempts provisions granting unfettered discretion (without requiring a showing as to how the jurisdiction actually exercises that discretion), on the ground that such discretion constitutes the "ultimate cudgel" that the jurisdiction can use to impede the provision of telecommunications service. *City of Auburn*, 260 F.3d at 1176; see *Qwest Corp.* v. *City of Santa Fe*, 380 F.3d 1258, 1270 (10th Cir. 2004); *TCG New York, Inc.* v. *City of White Plains*, 305 F.3d 67, 76-77 (2d Cir. 2002), cert. denied, 538 U.S. 923 (2003). And the ordinance at issue in this case goes even further than the challenged regulations in those cases, because it contains a host of other onerous requirements specifically targeted at wireless facilities. See Pet. 4-6.

It is therefore clear that this case would come out differently in at least two other circuits—which, it bears repeating, have unambiguously embraced the FCC's "materially inhibits" standard as their own. See p. 4, *supra*; Pet. 13-15.[4] For that reason, a substantial circuit conflict exists in not only a theoretical, but also a tangible, sense, and that conflict warrants this Court's review.

b. With regard to the government's contention that the conflict is insufficiently "settled": that contention

---

[4] Notably, the government does not dispute the proposition that, if the FCC's standard were properly applied, the San Diego County Wireless Ordinance would be preempted.

also lacks merit. Five circuits have now spoken on the interpretation of Section 253(a). The government suggests that those circuits that have adopted a broader interpretation of Section 253(a) may "reconsider the issue" on the ground that they "applied the [FCC's] 'materially inhibits' standard through the lens of [*City of*] *Auburn*," which the Ninth Circuit overruled in the decision below. Br. 16, 17. That is a curious suggestion. Each of those circuits simply adopted the FCC's "materially inhibits" standard; they did not apply it "through the lens of" *City of Auburn* (whatever that means). See *Puerto Rico Telephone Co.* v. *Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006); *City of Santa Fe*, 380 F.3d at 1271; *TCG New York*, 305 F.3d at 76. In fact, one of those circuits did not cite *City of Auburn* at all, and the other two circuits cited it only in passing (and for unrelated propositions). See *City of Santa Fe*, 380 F.3d at 1270, 1272; *TCG New York*, 305 F.3d at 78, 81, 82.[5] And, as discussed above, the actual standard of *City of Auburn* does not meaningfully differ from the FCC's "materially inhibits" standard. See p. 4, *supra*. Except in the unlikely event that those circuits walk away from the FCC's standard altogether, therefore, the circuit conflict will not be resolved.

In sum, there is no reason to believe that further reflection by the circuits that have spoken, or further percolation among the comparatively few circuits that have not spoken, will meaningfully alter the substantial circuit

---

[5] More broadly, as explained at greater length in the petition, those circuits did not place substantial weight on the use of the word "may" in interpreting Section 253(a); instead, they merely sought to give meaning to the successive phrase "have the effect of prohibiting." See Pet. 18-19. And it is clear that those circuits' interpretation of the latter phrase conflicts with the avowedly narrower interpretation adopted by the Ninth Circuit in this case. See p. 4, *supra*.

conflict that presently exists. The Court should intervene now to resolve that conflict.

2. The government contends (Br. 17-18) that, notwithstanding the circuit conflict on the interpretation of Section 253(a), this Court's review is not warranted because the FCC could eliminate the conflict by issuing rulings on the application of Section 253(a) pursuant to its authority to preempt the enforcement of state and local regulations under Section 253(d). That contention rests on a faulty premise. In *In re California Payphone Association*, 12 F.C.C.R. 14,191 (1997), the FCC first took the position that the relevant inquiry under Section 253(a) is whether "the [challenged regulation] materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *Id.* at 14,206 (¶ 31). As the government implicitly acknowledges, the existing circuit conflict does not simply involve the *application* of the FCC's "materially inhibits" standard; it also involves the question whether that standard is a valid, and thus binding, *interpretation* of Section 253(a) in the first place. See Br. 18 (noting that "[a]ny disagreement among the circuits *chiefly* involves the application of [the FCC's] test to various types of state and local regulations") (emphasis added). This Court, of course, routinely grants review to determine whether an agency's interpretation of an ambiguous statute is a reasonable one. See, *e.g.*, *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 986-1000 (2005).

It is therefore irrelevant that the FCC could elaborate on the application of the "materially inhibits" standard to other state and local regulations in response to

future petitions under Section 253(d).[6] If the Court were to grant review in this case and hold that the FCC's "materially inhibits" standard is a reasonable interpretation of Section 253(a), the FCC would remain free to flesh out that standard in future proceedings. Because the Ninth Circuit necessarily rejected the FCC's "materially inhibits" standard in the decision under review, the mere fact that the FCC has authority to elaborate on that standard provides no basis for denying certiorari.

B. This Case Is An Ideal Vehicle In Which To Resolve The Circuit Conflict

The government identifies two potential vehicle problems with this case. Neither is substantial.

1. The government first contends (Br. 21) that this case is a poor vehicle because the court of appeals did not analyze the "practical effect" of the Wireless Ordinance on the provision of telecommunications service. While that is true, it is hardly a basis for denying review. Although petitioner filed suit immediately after the Wireless Ordinance was enacted, petitioner subsequently developed and introduced evidence concerning the projected costs of compliance with the Wireless Ordinance, see, *e.g.*, C.A. E.R. 218-244, and evidence concerning the

---

[6] Notably, in the more than ten years since its ruling in *California Payphone Association*, the FCC has not meaningfully elaborated on the application of the "materially inhibits" standard. Moreover, there is no reason to believe that the FCC will do so anytime soon in circumstances similar to those presented here. While the FCC is currently considering a petition for a declaratory ruling concerning preemption under, *inter alia*, Section 253(a), that petition raises only the narrow and discrete question whether Section 253(a) preempts a regulation requiring *an automatic variance* for the placement of a wireless facility. See CTIA—The Wireless Association, Petition for Declaratory Ruling, WT Docket No. 08-165, at 35-37 (F.C.C. filed July 11, 2008).

actual implementation of the Wireless Ordinance, see, *e.g.*, *id.* at 96-111. The court of appeals simply ignored that evidence, seemingly based on its erroneous conclusion that, because petitioner's claim involved a facial challenge to the Wireless Ordinance, it was subject to the standard for facial challenges articulated in *United States* v. *Salerno*, 481 U.S. 739 (1987). See Pet. App. 16a.[7] The record in this case therefore contains precisely the type of factual evidence on the effect of the Wireless Ordinance that the government seemingly believes is necessary—and, in the event the Court agrees that the Ninth Circuit applied an excessively stringent standard for preemption under Section 253(a), the Court could either consider that evidence itself (to the extent it is relevant) or remand to the lower courts for application of the correct standard.

2. The government next contends (Br. 21-22) that this case involves the "unresolved threshold question" whether petitioner's preemption claim is governed by Section 253(a) or 47 U.S.C. 332(c)(7). The government, however, concedes (Br. 9) that the question does not independently warrant this Court's review—and for good reason, because the government cites no case from *any* court so much as hinting that a preemption claim like petitioner's may be brought only under Section 332(c)(7)

---

[7] While the government observes (Br. 15) that the court of appeals applied the *Salerno* standard, it conspicuously does not defend that aspect of the court of appeals' decision. Nor could it, because Section 253(a) itself supplies the substantive standard for a claim that a regulation is preempted. See Pet. 20-21; Reply Br. 5-6. It bears noting that every claim under Section 253(a) is in some sense a "facial" challenge, because the result of a successful claim under Section 253(a) is the invalidation of the regulation being challenged; claims differ only insofar as they can be brought before or after *enforcement* of the regulation in question.

and not under Section 253(a). In any event, even if there were a colorable argument that petitioner's claim is governed by Section 332(c)(7)—and the government does not contend as much—it is not necessary for this Court to resolve that issue at the threshold, because, as the court of appeals held (and the government does not dispute), "the legal standard is the same under either" Section 253(a) or Section 332(c)(7). Pet. App. 13a.[8] Any question concerning the applicability of Section 332(c)(7) therefore presents no bar to this Court's reaching, and resolving, the question of how to interpret Section 253(a)—a question on which the courts of appeals are deeply and intractably split.[9]

* * * * *

Given the ambivalence that pervades the government's brief, one is left with the inevitable sense that the government is recommending that the Court deny review largely out of a reluctance to take a definitive position on the merits in this case—preemption having seemingly become the third rail of the law in recent times. But the government's reticence, without more, is an in-

---

[8] The government suggests that "the court [of appeals] might revisit [its] conclusion [that Section 253(a) and Section 332(c)(7) must be interpreted consistently] * * * if this Court were to reverse [its] interpretation of Section 253(a)." Br. 21-22. Because the operative language in each provision is identical, however, it is hard to see why the court of appeals would do so.

[9] With regard to the companion *Level 3 Communications* case, the government notes that *Level 3 Communications* presents additional issues concerning the interpretation of Section 253(c), Br. 18-19, and that the factual record in that case is underdeveloped, Br. 20. For those reasons and the additional reasons stated in petitioner's prior briefs, this case would be the superior vehicle in which to consider the proper interpretation of Section 253(a). See Pet. 26-29; Reply Br. 7-11.

sufficient reason for denying review. Not only does this case involve a substantial and expressly recognized circuit conflict, but it presents an issue of enormous importance to the telecommunications industry in general and the wireless industry in particular—and indeed, given the explosive growth of the telecommunications industry, to the American economy as a whole.[10] If the Ninth Circuit's decision is allowed to stand, it will provide a template for localities to impose draconian restrictions on the placement and design of wireless facilities, in derogation of the Telecommunications Act's central promise that wireless providers can offer services free of such intrusive and inconsistent local regulation. The question presented by this case is surely worthy of the Court's review.

* * * * *

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DANIEL T. PASCUCCI
NATHAN R. HAMLER
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.
3580 Carmel Mountain Road, Suite 300
San Diego, CA 92130
(858) 314-1500

KANNON K. SHANMUGAM
THOMAS J. ROBERTS
SARAH F. TEICH
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000

JUNE 2009

---

[10] Numerous industry organizations (including PCIA and CTIA) and other telecommunications providers (including Verizon and T-Mobile) have participated in this case as amici curiae, whether in support of petitioner before the court of appeals, in support of the petition for certiorari, or both.

21

(7)

Supreme Court, U.S.
FILED
FEB 24 2009
OFFICE OF THE CLERK

No. 08-759

In the Supreme Court of the United States

SPRINT TELEPHONY PCS, L.P., PETITIONER

v.

COUNTY OF SAN DIEGO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

DANIEL T. PASCUCCI
NATHAN R. HAMLER
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.
3580 Carmel Mountain Road, Suite 300
San Diego, CA 92130
(858) 314-1500

KANNON K. SHANMUGAM
Counsel of Record
THOMAS J. ROBERTS
SARAH F. TEICH
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000

TABLE OF CONTENTS

Page

A. The decision below creates an acknowledged conflict with the decisions of several other circuits 2

B. This case is an ideal vehicle in which to resolve the circuit conflict 4

C. This case is a better vehicle for the Court's review than *Level 3 Communications* 7

TABLE OF AUTHORITIES

Cases:

In re California Payphone Association, 12 F.C.C.R. 14,191 (1997) 4

City of Auburn v. *Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), cert. denied, 534 U.S. 1079 (2002) 2, 6

Level 3 Communications, L.L.C. v. *City of St. Louis*, 477 F.3d 528 (8th Cir. 2007) 8

Level 3 Communications, L.L.C. v. *City of St. Louis*, 405 F. Supp. 2d 1047 (E.D. Mo. 2005) 9

TCG Detroit v. *City of Dearborn*, 206 F.3d 618 (6th Cir. 2000) 8

United States v. *Johnston*, 268 U.S. 220 (1925) 9

United States v. *Salerno*, 481 U.S. 739 (1987) 5, 6

Statutes:

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ..... 1, 4

47 U.S.C. 253(a) ..... *passim*

47 U.S.C. 253(c) 7, 8, 9, 10

47 U.S.C. 332(c)(7) 4, 5

In the Supreme Court of the United States

No. 08-759

SPRINT TELEPHONY PCS, L.P., PETITIONER

v.

COUNTY OF SAN DIEGO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Notwithstanding respondents' valiant efforts to suggest otherwise, there can be no doubt that there is a circuit conflict concerning the interpretation of 47 U.S.C. 253(a)—one of the central provisions of the Telecommunications Act of 1996. The only open question is whether this case constitutes the optimal vehicle in which to address that conflict. The better view is that it does. The various vehicle problems asserted by respondents are illusory, and it is now clear that the other pending petition presenting the same question suffers from substantial vehicle problems of its own. The Court should grant review in this case to resolve the clear circuit conflict concerning the scope of Section 253(a) and to correct the Ninth Circuit's seriously flawed interpretation.

A. The Decision Below Creates An Acknowledged Conflict With The Decisions Of Several Other Circuits

Respondents first contend (Br. in Opp. 18-30) that this case does not present a circuit conflict warranting the Court's review. That contention plainly lacks merit.

1. For the reasons stated in the petition for certiorari, there is a clear and substantial circuit conflict on the interpretation of Section 253(a): specifically, on the question whether a state or local regulation that does not expressly prohibit the provision of telecommunications service is nevertheless preempted by Section 253(a) if it substantially impedes an entity from providing service. See Pet. 12-17. In the decision below, the Ninth Circuit overruled its earlier decision in *City of Auburn* v. *Qwest Corp.*, 260 F.3d 1160 (2001), cert. denied, 534 U.S. 1079 (2002), which had recognized that a regulation could be preempted by Section 253(a) if it "created a substantial . . . barrier" to the provision of telecommunications service. Pet. App. 8a-9a (quoting *City of Auburn*, 260 F.3d at 1176). The court instead held that it was insufficient for a challenging provider to show "the mere possibility of prohibition." *Id.* at 11a (citation omitted). In so doing, the Ninth Circuit expressly recognized that its "narrow" interpretation of Section 253(a) conflicted with the interpretations of the First, Second, and Tenth Circuits. See *id.* at 9a, 11a.

2. Respondents primarily contend (Br. in Opp. 22-30) that the petition should be denied because, while there may be a circuit conflict involving the interpretation of Section 253(a), that conflict properly concerns only the provision's use of the word "may," not its use of the successive phrase "have the effect of prohibiting." That is a puzzling contention. As we have explained, the decisions of the First, Second, and Tenth Circuits did not place substantial weight on the use of the word "may" in

interpreting Section 253(a); instead, those decisions merely sought to give meaning to the successive phrase "have the effect of prohibiting." See Pet. 18-19. Even if those decisions had focused on the word "may," however, it would not provide a basis for denying review in this case. Whatever the precise language in Section 253(a) that triggered the circuit conflict, respondents effectively concede that *some* conflict concerning the interpretation of Section 253(a) exists. See, *e.g.*, Br. in Opp. 30 (acknowledging "the circuit split identified by the Ninth Circuit"). And that conflict is evidently implicated by the question presented: *viz.*, whether Section 253(a) preempts a state or local regulation that does not expressly prohibit the provision of telecommunications service, but substantially impedes an entity from providing service. See Pet. i.

In the alternative, respondents argue (Br. in Opp. 18-21) that further review is unwarranted because, to the extent there is a divergence in the circuits' interpretations of Section 253(a), any divergence is relatively modest. Specifically, respondents suggest the Ninth Circuit did not hold that a regulation that does not expressly prohibit the provision of telecommunications service is preempted only if it effects a complete ban on the provision of service. That characterization of the Ninth Circuit's decision is mistaken. Although the court provided various examples of hypothetical regulations that would be preempted under its standard, each of those examples would be tantamount to a complete ban. For example, the court cited a regulation that "impose[s] an excessively long waiting period." Pet. App. 15a. Such a regulation would completely ban a carrier from providing service for the duration of the waiting period—even if, as respondents suggest (Br. in Opp. 20), the carrier may be permitted to provide service at some later date.

In any event, regardless whether the Ninth Circuit's standard is properly characterized as preempting only regulations that effect a complete ban, it is clear that, applying its avowedly "narrow" standard, the Ninth Circuit would uphold a substantial array of regulations that would be preempted under the standards of at least three other circuits (and the Federal Communications Commission).* The resulting disuniformity in the interpretation of one of the Telecommunications Act's most important provisions merits immediate review.

B. This Case Is An Ideal Vehicle In Which To Resolve The Circuit Conflict

Respondents contend (Br. in Opp. 31-40) that this case would constitute a poor vehicle for review of the circuit conflict concerning the interpretation of Section 253(a). All of the vehicle problems that respondents identify are insubstantial.

1. Respondents first renew their contention (Br. in Opp. 31-35) that petitioner's preemption claim was governed not by Section 253(a), but rather by 47 U.S.C. 332(c)(7). As a preliminary matter, respondents' contention is entirely meritless, because Section 253(a) applies

---

* Remarkably, respondents suggest (Br. in Opp. 19) that the Ninth Circuit's interpretation of Section 253(a) was consistent with the FCC's simply because the Ninth Circuit cited the FCC's ruling in *In re California Payphone Association*, 12 F.C.C.R. 14,191 (1997). As we have explained (Pet. 19-20), however, the Ninth Circuit wholly ignored the critical language in that ruling, in which the FCC made clear that, in determining whether a regulation effectively prohibits the ability to provide service, it would "consider whether the [regulation] materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *Id.* at 14,206 (¶ 31). And the Ninth Circuit repudiated the decisions of other circuits that had expressly embraced the FCC's standard. See Pet. App. 9a.

to challenges to "statutes" and "regulations" (such as the San Diego County Wireless Ordinance), whereas Section 332(c)(7) applies only to challenges to particular "decisions" made by local authorities. Critically, respondents fail to cite a single case that so much as hints that a provider may bring a preemption claim like petitioner's only under Section 332(c)(7) and not under Section 253(a). More broadly, respondents do not contend that the *substantive standard* for review under Section 332(c)(7) would be any different from the standard under Section 253(a)—nor could they, because, as the Ninth Circuit noted, the operative language in each provision is identical. See Pet. App. 13a. Instead, respondents merely argue (Br. in Opp. 35) that, if petitioner's claim were governed by Section 332(c)(7), it would be time-barred. That argument is forfeited, however, because respondents failed to raise it before the district court; to the contrary, before the district court, respondents argued only that any such claim would be *premature*. See C.A. E.R. 20. It was presumably for that reason that the court of appeals concluded that respondents' contention concerning the applicability of Section 332(c)(7) presented no bar to its reaching the question of how to interpret Section 253(a). See Pet. App. 13a. This Court should do likewise.

2. Respondents also argue (Br. in Opp. 38-40) that this case involves a facial challenge to the San Diego County Wireless Ordinance—and that, as such, it is subject to the standard for facial challenges articulated in *United States* v. *Salerno*, 481 U.S. 739 (1987), under which a plaintiff must show that the challenged statute or regulation is invalid in all of its applications. As we have explained, however, Section 253(a) expressly preempts any "statute" or "regulation" that prohibits or has the effect of prohibiting the ability of any entity to pro-

vide telecommunications services—and thus, by its terms, provides the entire substantive standard for a preemption challenge to a statute or regulation, without any need to import *Salerno* into the analysis. See Pet. 20-21. The Ninth Circuit's reliance on *Salerno* was a critical component of its ultimate holding that the Wireless Ordinance could not be preempted unless it effectively resulted in a complete ban on the provision of telecommunications service. See, *e.g.*, Pet. App. 16a. Far from constituting a justification for denying review in this case, the court's additional error in relying on *Salerno* constitutes a justification for granting it.

3. Respondents additionally contend (Br. in Opp. 36-38) that resolution of the question whether Section 253(a) preempts a state or local regulation that substantially impedes the provision of telecommunications service would not be outcome-dispositive in this case. That contention, however, is belied by the decisions of the district court and the court of appeals panel, both of which held that, under the "substantial barrier" standard articulated by the Ninth Circuit in *City of Auburn*, the challenged provisions of the San Diego County Wireless Ordinance were preempted. See Pet. App. 47a-48a, 70a-74a. It is also belied by the decisions of other courts, which have routinely invalidated similar requirements under the substantial-impediment standard. See Pet. 24-25. In addition to challenging the Wireless Ordinance on its face, moreover, petitioners presented substantial evidence that the Wireless Ordinance had in fact "delayed or in some cases eliminated [petitioner's] ability to develop its network in San Diego and decreased [petitioner's] market share due to [its] inability to obtain the required wireless coverage to attract customers." Pet. C.A. Br. 19; see, *e.g.*, C.A. E.R. 218-244. Respondents' contention (Br. in Opp. 38) that petitioner "provid[ed] no

evidence regarding the impact of the [Wireless] Ordinance" is, therefore, simply false. Because resolution of the question presented would plainly be outcome-dispositive in this case, and because there is no obstacle to the Court's reaching that question here, the Court should grant the petition.

C. This Case Is A Better Vehicle For The Court's Review Than *Level 3 Communications*

Because this case is an ideal vehicle for resolving the circuit conflict concerning the interpretation of Section 253(a), the Court should grant review here. In the petition, we suggested that the Court may also wish to grant review in another pending case presenting the same issue. See *Level 3 Communications, L.L.C.* v. *City of St. Louis*, No. 08-626 (petition filed Nov. 7, 2008). As a result of additional briefing since the petition was filed, however, it is now clear that there are substantial vehicle problems with *Level 3 Communications*. The Court should therefore grant only the instant petition and hold the petition in *Level 3 Communications* pending the disposition of this case.

1. Most notably, *Level 3 Communications* presents issues concerning the interpretation not only of Section 253(a), but also of Section 253(c), which preserves the authority of state and local governments to manage public rights-of-way. The legal and factual complexities of the Section 253(c) issues decisively counsel against further review in that case.

a. Although the provider in *Level 3 Communications* does not separately rely on Section 253(c) in its question presented, the provider asks this Court to resolve not only the circuit conflict concerning the interpretation of Section 253(a), but also an additional circuit conflict on the issue whether a regulation may be pre-

empted under Section 253(c) regardless whether it falls within the scope of Section 253(a). See 08-626 Pet. 23, 29-30. As a preliminary matter, it is far from clear whether that conflict would independently merit the Court's review, because only one circuit has suggested that a provider may pursue a discrete preemption claim under Section 253(c)—and it did so only in passing. See *TCG Detroit* v. *City of Dearborn*, 206 F.3d 618, 624 (6th Cir. 2000) (noting that "[a] violation of § 253(c) might well *not* involve violating § 253(a)").

Even assuming that it would be desirable to resolve any circuit conflict concerning the interpretation of Section 253(c), however, it is far from clear whether *Level 3 Communications* would be a suitable vehicle in which to do so, because the provider does not appear to have contended before the court of appeals that Section 253(c) provided a discrete basis for preemption. Although the provider asserts (without elaboration) that it made that argument below, see Level 3 Communications Amicus Br. 3, it did not argue in its brief below that Section 253(c) provided a discrete basis for preemption; to the contrary, it asserted that *TCG Detroit*, the one circuit decision to adopt that rule, was "largely devoid of any analysis." Br. of Appellee at 39, *Level 3 Communications, L.L.C.* v. *City of St. Louis*, 477 F.3d 528 (8th Cir. 2007) (Nos. 06-1398 & 06-1459). To the extent the court of appeals in *Level 3 Communications* suggested that a provider may not pursue an affirmative preemption claim under Section 253(c), therefore, that suggestion constituted mere dictum. See *Level 3 Communications*, 477 F.3d at 531-532 (08-626 Pet. App. 27a-29a).

b. Even more troubling, the provider in *Level 3 Communications* seemingly asks the Court to consider (and decide) whether, as a factual matter, the challenged requirements of the ordinance at issue would fall within

the scope of Section 253(c): specifically, whether the challenged fees constitute "fair and reasonable compensation," and whether other challenged requirements constitute "manage[ment] of the public rights-of-way * * * on a competitively neutral and nondiscriminatory basis." See 08-626 Pet. 21-23. As reflected by the lengthy discussions in the district court's opinion in *Level 3 Communications* (and in the provider's brief on appeal), the application of Section 253(c) in that case would present a variety of complex factual issues, including (1) the calculation of the fees charged by the municipality for use of public rights-of-way; (2) the relationship between those fees and the municipality's actual costs; (3) the disparate effect of those fees on incumbent and competitive providers; (4) the comparative effect of those fees on companies providing both local and long-distance service and companies providing only one type of service; and (5) the relative effect of those fees on telecommunications providers and other utilities using public rights-of-way. See *Level 3 Communications, L.L.C.* v. *City of St. Louis*, 405 F. Supp. 2d 1047, 1056-1063 (E.D. Mo. 2005); Br. of Appellee at 37-52, *Level 3 Communications*, *supra* (Nos. 06-1398 & 06-1459). This Court, of course, does not ordinarily "grant * * * certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

c. In its amicus brief in this case, the provider in *Level 3 Communications* suggests (Br. 3) that "the proper construction of Section 253(a) cannot be understood without reference to the exception provided by Section 253(c)." To the extent that is true, however, there is no reason why the Court could not consider in this case any relevance of Section 253(c) to the *interpretation* of Section 253(a), even if Section 253(c) does not by its terms apply here. See Pet. 28 n.10. And in the

event that certiorari is granted in this case, the provider in *Level 3 Communications* can—and "no doubt will," Level 3 Communications Amicus Br. 6—file an amicus brief on the merits, in which it will be able to bring to the Court's attention any arguments about the relevance of Section 253(c) to the interpretation of Section 253(a) (and any pertinent facts in its case that illustrate that relevance). Because the petition in *Level 3 Communications* presents a host of complicating factual and legal issues concerning the application and interpretation of Section 253(c), the Court should hold that petition pending its resolution of the pure legal issue concerning the interpretation of Section 253(a) in this case.

2. In its amicus brief, the provider in *Level 3 Communications* contends (Br. 4) that its petition "more directly presents the circuit conflict over the proper construction of Section 253(a)," on the ground that more of the cases in the circuit conflict involve regulations governing access to public rights-of-way than regulations governing the provision of wireless telecommunications services more generally. Even if that is true as an empirical matter, it is hard to see why it would be a basis for granting review in that case rather than this one. Both cases plainly implicate the same circuit conflict over the proper construction of Section 253(a); indeed, the provider in *Level 3 Communications* cited (and discussed at length) the Ninth Circuit's decision in this case in setting out the circuit conflict in its petition. See 08-626 Pet. 24, 27-28.

To the extent the factual context is relevant, however, this case arises in perhaps the most important context in which Section 253(a) currently applies. As we have explained, the demand for wireless telecommunications services continues to grow, and, at the same time, local communities have sought to push the envelope by

imposing ever more stringent limitations on the construction or modification of wireless facilities. See Pet. 28-29. And as amicus PCIA points out, numerous localities in the Ninth Circuit have responded to the decision in this case by "initiating or reinstating plans to adopt rigorous zoning ordinances or by abandoning plans to tailor their ordinances in light of" earlier decisions construing Section 253(a) more broadly. Br. 14-15; see *id.* at 15-17 (citing examples). The Ninth Circuit's decision, moreover, seemingly goes even further than the Eighth Circuit's decision in *Level 3 Communications* in narrowing the scope of Section 253(a). See Pet. 16-17.

If the en banc Ninth Circuit's decision is allowed to stand, localities in the Nation's largest and most populous circuit will be free to impose draconian restrictions on the placement and design of wireless facilities, as the County of San Diego did here. The Ninth Circuit's decision is therefore of enormous practical, as well as legal, significance. For the reasons stated in the petition and this reply, it merits the Court's review.

* * * * *

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DANIEL T. PASCUCCI
NATHAN R. HAMLER
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.
3580 Carmel Mountain Road, Suite 300
San Diego, CA 92130
(858) 314-1500

KANNON K. SHANMUGAM
THOMAS J. ROBERTS
SARAH F. TEICH
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000

FEBRUARY 2009

Supreme Court, U.S.
FILED
MAY 2 2 2009
OFFICE OF THE CLERK

Nos. 08-626 and 08-759

In the Supreme Court of the United States

LEVEL 3 COMMUNICATIONS, LLC, PETITIONER

v.

CITY OF ST. LOUIS, MISSOURI

SPRINT TELEPHONY PCS, L.P., PETITIONER

v.

SAN DIEGO COUNTY, CALIFORNIA, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE EIGHTH AND NINTH CIRCUITS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ELENA KAGAN
Solicitor General
Counsel of Record

MALCOLM L. STEWART
Deputy Solicitor General

ERIC D. MILLER
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

P. MICHELE ELLISON
Acting General Counsel

JOSEPH R. PALMORE
Deputy General Counsel

RICHARD K. WELCH
Deputy Associate General Counsel

NANDAN M. JOSHI
Counsel
Federal Communications Commission
Washington, D.C. 20554

QUESTIONS PRESENTED

1. Whether 47 U.S.C. 253(a), which provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service," preempts only those state and local requirements that have an actual effect on the ability to provide service, as opposed to those that might have such an effect in the future.

2. Whether 47 U.S.C. 253(c), which provides that "[n]othing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation * * * for use of public rights-of-way," preempts regulations not otherwise preempted by 47 U.S.C. 253(a).

TABLE OF CONTENTS

Page

Statement 1
Discussion 8
A. The Eighth and Ninth Circuits correctly held that preemption under Section 253(a) must be based on the actual effect of a law, rather than the mere possibility of a future effect 10
B. There is no conflict among the courts of appeals that warrants this Court's intervention at this time 15
C. Neither petition presents an appropriate vehicle for this Court's review of the questions presented ... 20
Conclusion 22

TABLE OF AUTHORITIES

Cases:

AT&T v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999) 2
BellSouth Telecomms., Inc. v. *Town of Palm Beach*, 252 F.3d 1169 (11th Cir. 2001) 19
Braxton v. *United States*, 500 U.S. 344 (1991) 18
California Payphone Ass'n Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, Cal. Pursuant to Sec. 253(d) of the Commc'ns Act of 1934, 12 F.C.C.R. 14,191 (1997) ..... *passim*
City of Auburn v. *Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), cert. denied, 534 U.S. 1079 (2002) ... 6, 7
City of Rancho Palos Verdes v. *Abrams*, 544 U.S. 113 (2005) 6
MetroPCS, Inc. v. *City & County of San Francisco*, 400 F.3d 715 (9th Cir. 2005) 6

Cases—Continued: Page

National Cable & Telecomms. Ass'n v. *Brand X Internet Servs.*, 545 U.S. 967 (2005) 18

Petition of Pittencrieff Commc'ns, Inc. for Declaratory Ruling Regarding Preemption of the Tex. Pub. Util. Regulatory Act of 1995, 13 F.C.C.R. 1735 (1997) 11

Public Util. Comm'n of Tex., 13 F.C.C.R. 3460 (1997) 11, 12, 19, 21

Puerto Rico Tel. Co. v. *Municipality of Guayanilla*, 450 F.3d 9 (1st Cir. 2006) 15, 16

Qwest Commc'ns, Inc. v. *City of Berkeley*, 433 F.3d 1253 (9th Cir. 2006) 11

Qwest Corp. v. *City of Portland*, 385 F.3d 1236 (9th Cir. 2004), cert. denied, 544 U.S. 1049 (2005) 7, 11

Qwest Corp. v. *City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004) 15, 16, 17

Silver Star Tel. Co., Petition for Preemption & Declaratory Ruling, 12 F.C.C.R. 15,639 (1997) aff'd, 13 F.C.C.R. 16,356 (1998), petition for review denied *sub nom. RT Commc'ns, Inc.* v. *FCC*, 201 F.3d 1264 (10th Cir. 2000) 12

TCG Detroit v. *City of Dearborn*, 206 F.3d 618 (6th Cir. 2000) 18, 19

TCG New York, Inc. v. *City of White Plains*, 305 F.3d 67 (2d Cir. 2002), cert. denied, 538 U.S. 923 (2003) 15, 16, 17

United States v. *Salerno*, 481 U.S. 739 (1987) 7, 15

Verizon Commc'ns, Inc. v. *FCC*, 535 U.S. 467 (2002) 2

Statutes: Page

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 2
47 U.S.C. 253 ..... *passim*
47 U.S.C. 253(a) ..... *passim*
47 U.S.C. 253(c) 2, 3, 4, 9, 18, 19
47 U.S.C. 253(d) 2, 9, 17
47 U.S.C. 332(c)(7) 5, 6, 21
47 U.S.C. 332(c)(7)(B) 22
47 U.S.C. 332(c)(7)(B)(i)(II) 6, 21, 22

In the Supreme Court of the United States

No. 08-626

LEVEL 3 COMMUNICATIONS, LLC, PETITIONER

v.

CITY OF ST. LOUIS, MISSOURI

No. 08-759

SPRINT TELEPHONY PCS, L.P., PETITIONER

v.

SAN DIEGO COUNTY, CALIFORNIA, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE EIGHTH AND NINTH CIRCUITS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States in these cases. In the view of the United States, both of the petitions for writs of certiorari should be denied.

STATEMENT

1. Before 1996, "States typically granted an exclusive franchise in each local service area to a local exchange carrier" to provide local telephone service.

AT&T v. *Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). In the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, Congress eliminated those monopoly franchises by enacting 47 U.S.C. 253, which "prohibits state and local regulation that impedes the provision of 'telecommunications service.'" *Verizon Commc'ns Inc.* v. *FCC*, 535 U.S. 467, 491 (2002) (citation omitted). Section 253(a) provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. 253(a). Section 253(c) creates a safe harbor from that basic prohibition by providing that Section 253 does not "affect[] the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way." 47 U.S.C. 253(c).

Under 47 U.S.C. 253(d), the Federal Communications Commission (FCC or Commission) is authorized to "preempt the enforcement of" any state or local "statute, regulation, or legal requirement" that it determines violates Section 253(a). The Commission has concluded that a law "prohibits" an entity from providing telecommunications service if it imposes "an express legal prohibition of service covering all of the relevant geographic market." *California Payphone Ass'n Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, Cal. Pursuant to Sec. 253(d) of the Commc'ns Act of 1934*, 12 F.C.C.R. 14,191, 14,205 ¶ 30 (1997) (*California Payphone Order*). The Commission has concluded that a law "has the 'effect of prohibiting' the ability of any entity to provide" telecommunications

service if it "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *Id.* at 14,206 ¶ 31.

2. *No. 08-626.* a. This case concerns a St. Louis ordinance that requires telecommunications providers using public rights-of-way to obtain licenses from the city and to comply with various municipal requirements. 08-626 Pet. App. 24a-25a. The city also imposes an annual license fee, which is calculated on the basis of the "number of linear feet of conduit installed" and the "number of active conduits within each linear-foot." *Id.* at 25a.

In April 1999, petitioner Level 3 Communications (Level 3) entered into a license agreement with St. Louis. 08-626 Pet. App. 24a. After disputes arose regarding the validity of the license fee and various non-fee requirements, each party brought suit against the other in the United States District Court for the Eastern District of Missouri. *Id.* at 25a. On cross-motions for summary judgment, the district court concluded that the ordinance "includes several provisions that in combination have the effect of prohibiting the ability to provide telecommunications services under 47 U.S.C. § 253(a)." *Id.* at 49a (quotation marks omitted). The court held that the city's license fee was not saved by the Section 253(c) safe harbor because the city had not shown that the fees "have any relation to the City's costs in managing, inspecting, and maintaining its rights-of-way," and so had failed to meet its burden of proving that the fees were "fair and reasonable." *Id.* at 54a. The court upheld the ordinance's non-fee provisions, however, as reasonable management requirements for rights-of-way under Section 253(c). *Id.* at 56a-70a.

b. The Eighth Circuit reversed. 08-626 Pet. App. 23a-35a. The court observed that Section 253(a) "states the general rule" of preemption, while Section 253(c) "provides the exception—a safe harbor functioning as an affirmative defense—to that rule." *Id.* at 27a-28a. The court then stated that "a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition." *Id.* at 29a. Relying on the FCC's *California Payphone Order*, the court explained that, in order to prevail on a claim of preemption under Section 253(a), a plaintiff "need not show a complete or insurmountable prohibition, but it must show an existing material interference with the ability to compete in a fair and balanced market." *Id.* at 31a (citation omitted).

Applying its interpretation of Section 253, the court of appeals found "insufficient evidence from Level 3 of any actual or effective prohibition, let alone one that materially inhibits its operations." 08-626 Pet. App. 32a. In reaching that conclusion, the court emphasized Level 3's acknowledgment that it could not "state with specificity what additional services it might have provided had it been able to freely use the money that it was forced to pay to the City for access to the public rights-of-way." *Ibid.* (quotation marks omitted). The court further concluded that, because Level 3 had failed to carry its burden of showing that the city's license fee fell within Section 253(a), it was "premature" to consider whether the fee was "fair and reasonable" under Section 253(c). *Id.* at 32a-33a. The court stated that Section 253(c) does not have independent preemptive effect, but instead is a safe harbor for legal requirements that would otherwise violate Section 253(a). *Id.* at 28a-29a.

c. On remand, the district court denied Level 3's request to reopen discovery, and it upheld the city's ordinance and its license agreement in their entirety. 08-626 Pet. App. 10a-22a. The Eighth Circuit affirmed. *Id.* at 1a-9a.

3. *No. 08-759.* a. This case involves a San Diego County ordinance that "imposes restrictions and permit requirements on the construction and location of wireless telecommunications facilities," such as cell towers. 08-759 Pet. App. 2a. The ordinance prescribes application requirements for parties seeking to construct wireless facilities (*id.* at 100a-102a); creates a four-tier application-processing system based "primarily on the visibility and location of the proposed facility" (*id.* at 3a; see *id.* at 102a-107a); designates certain zones and locations as "preferred" for the siting of wireless facilities (*id.* at 107a-110a); and establishes various design and maintenance standards for such facilities (*id.* at 110a-113a). The county "retains discretionary authority to deny a use permit application or to grant the application conditionally." *Id.* at 4a.

Petitioner Sprint Telephony PCS, L.P. (Sprint) sued San Diego County in the United States District Court for the Southern District of California, alleging that the ordinance was preempted under Section 253. 08-759 Pet. App. 4a-5a. The district court granted in part and denied in part Sprint's motion for partial summary judgment. *Id.* at 54a-55a. The court concluded (*id.* at 61a-64a) that Sprint could invoke Section 253 as a possible basis for preemption notwithstanding 47 U.S.C. 332(c)(7), which addresses the application of state and local zoning laws and "imposes specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of

[wireless] facilities." *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 115 (2005).

Turning to the merits of the Section 253 claim, the district court concluded that San Diego's wireless-siting ordinance, viewed together with the county's non-telecommunications-specific "use permit" regulations, had "the collective effect of prohibiting the provision of telecommunications service." 08-759 Pet. App. 70a. The district court stated that, under the county's regulatory framework, applicants must comply with "burdensome submission requirements," must "state their willingness" to allow other carriers to co-locate their facilities with those of the applicant, and are subject to unrestricted public hearings and the county's "unfettered discretion" as to whether a permit will be granted or modified and the conditions that will be imposed. *Id.* at 70a-71a.

b. A panel of the Ninth Circuit affirmed, 08-759 Pet. App. 18a-53a, but the Ninth Circuit then granted rehearing en banc and unanimously reversed the district court's judgment, *id.* at 1a-17a. The en banc court first considered the relationship between Sections 253 and 332(c)(7). *Id.* at 6a-13a. The court observed that Section 332(c)(7)(B)(i)(II) preempts local regulations that "prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. 332(c)(7)(B)(i)(II). The court explained that, under circuit precedent, "a locality runs afoul of that provision if (1) it imposes a 'city-wide general ban on wireless services' or (2) it actually imposes restrictions that amount to an effective prohibition." 08-759 Pet. App. 8a (quoting *MetroPCS, Inc.* v. *City & County of San Francisco*, 400 F.3d 715, 730 (9th Cir. 2005)). In contrast, the court noted that, beginning with *City of Auburn* v. *Qwest*

Corp., 260 F.3d 1160 (2001) (*Auburn*), cert. denied, 534 U.S. 1079 (2002), the Ninth Circuit had interpreted Section 253(a)'s "nearly identical text" to reach local regulations that "'may . . . have the effect of prohibiting'" the provision of telecommunications services. 08-759 Pet. App. 8a (quoting *Auburn*, 260 F.3d at 1175); see *Qwest Corp.* v. *City of Portland*, 385 F.3d 1236, 1241 (9th Cir. 2004), cert. denied, 544 U.S. 1049 (2005). Under the *Auburn* standard, a local regulation would be preempted if it "'allow[ed] a city to bar' provision of services" because, for instance, it "imposed procedural requirements, charged fees, authorized civil and criminal penalties, and * * * reserved discretion to the city to grant, deny, or revoke" permits. 08-759 Pet. App. 8a-9a (quoting *Auburn*, 260 F.3d at 1176).

The Ninth Circuit concluded that the *Auburn* standard was not consistent with the language of Section 253. 08-759 Pet. App. 10a-11a. Accordingly, the court "overrule[d] *Auburn* and join[ed] the Eighth Circuit in holding that 'a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition.'" *Id.* at 11a (quoting 08-626 Pet. App. 29a). Having thus "harmonize[d]" its "interpretations of the identical relevant text in §§ 253(a) and 332(c)(7)(B)(i)(II)," the court concluded that it "need not decide whether Sprint's suit falls under § 253 or § 332." *Id.* at 13a.

Turning to the merits of the preemption claim, the court of appeals held that, because Sprint had raised a facial challenge to San Diego's ordinance, Sprint was required to establish that "no set of circumstances exists under which the [ordinance] would be valid." 08-759 Pet. App. 13a-14a (quoting *United States* v. *Salerno*, 481 U.S. 739, 745 (1987)). The court concluded that Sprint

had failed to make that showing. *Id.* at 14a-17a. The court acknowledged that the ordinance granted local officials "some discretion" with respect to wireless-siting applications, and that it imposed various application and public hearing requirements on providers. *Id.* at 15a. The court determined, however, that those provisions would not necessarily be implemented in a manner that would cause wireless services to be effectively prohibited. *Id.* at 14a-15a. The court explained that "[i]t is certainly true that a zoning board *could* exercise its discretion to effectively prohibit the provision of wireless services, but it is equally true (and more likely) that a zoning board would exercise its discretion only to balance the competing goals of * * * the provision of wireless services and other valid public goals such as safety and aesthetics." *Id.* at 15a. The court also concluded that Sprint "ha[d] not identified a single [substantive] requirement" of the ordinance "that effectively prohibits it from providing wireless services." *Id.* at 15a-16a.

DISCUSSION

Although some aspects of the Eighth and Ninth Circuits' opinions might be read to suggest an unduly narrow understanding of Section 253(a)'s preemptive scope, neither decision warrants this Court's review. Both courts of appeals correctly held that a plaintiff seeking preemption under Section 253 cannot meet its burden simply by alleging that, under circumstances that might exist at some indeterminate future time, a legal requirement "may" affect its ability to provide a telecommunications service. Instead, a plaintiff must present evidence of the practical effects of the requirement at issue. In these cases, the courts of appeals concluded that

petitioners had failed to carry that burden. Those case-specific determinations do not warrant further review.

Nor is there a clear conflict among the circuits on the standard for preemption under Section 253(a). The courts of appeals uniformly recognize that the FCC's *California Payphone Order*, 12 F.C.C.R. 14,191 (1997), prescribes the applicable standard for determining whether a legal requirement has the effect of prohibiting the ability to provide a telecommunications service. Although some circuits have interpreted the Commission's standard through the lens of *Auburn*'s more-preemptive "may" standard—contrary to the approach of the Eighth and Ninth Circuits' decisions here—the conflict is not sufficiently settled or stark to warrant this Court's resolution at this time. Moreover, the Commission can use its authority under Section 253(d) to help correct and unify the interpretation and application of Section 253, obviating the need for this Court's intervention. Review is likewise not warranted to address the shallow disagreement between the Eighth and Sixth Circuits about whether Section 253(c) operates as an independent basis for preemption.

Finally, neither of the petitions presents a good vehicle for this Court's consideration of the questions presented. Both courts of appeals relied on petitioners' failure to develop substantial evidentiary records concerning the practical impact of the regulations at issue on the provision of telecommunications service. The Court could more fully consider the questions presented in a case with a better-developed factual record. In addition, in No. 08-759, there is an unresolved threshold question whether Section 253 applies to municipal ordinances that regulate the siting of wireless facilities. That issue does not independently warrant review, and

it would be a potential barrier to this Court's resolution of the question presented in the case.

A. The Eighth And Ninth Circuits Correctly Held That Preemption Under Section 253(a) Must Be Based On The Actual Effect Of A Law, Rather Than The Mere Possibility Of A Future Effect

1. The Eighth and Ninth Circuits held "that a plaintiff suing a municipality under section 253(a) must show" that the municipal ordinance that it seeks to have preempted results in the "actual or effective prohibition" of a carrier's ability to provide telecommunications services, "rather than the mere possibility of prohibition." 08-626 Pet. App. 31a; see 08-759 Pet. App. 11a. That conclusion is consistent with the language of Section 253(a) and with the Commission's decisions applying that provision.

Section 253(a) provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. 253(a). As the Eighth Circuit observed, the "subject of the sentence * * * is followed by two discrete phrases, one barring any regulation which prohibits telecommunications services, and another barring regulations achieving effective prohibition." 08-626 Pet. App. 30a; accord *California Payphone Order*, 12 F.C.C.R. at 14,205-14,206 ¶¶ 30-31.

Focusing on the word "may" in Section 253(a), some courts of appeals have suggested that "'regulations that *may* have the effect of prohibiting the provision of telecommunications services are preempted,'" without regard to their "actual impact" on service providers.

Qwest Commc'ns, Inc. v. *City of Berkeley*, 433 F.3d 1253, 1256-1257 (9th Cir. 2006) (quoting *Qwest Corp.* v. *City of Portland*, 385 F.3d 1236, 1241 (9th Cir. 2004), cert. denied, 544 U.S. 1049 (2005)). That suggestion is incorrect, and petitioners make little effort to defend it. As the Ninth Circuit explained below, "Congress' use of the word 'may' works in tandem with the negative modifier '[n]o' to convey the meaning that 'state and local regulations shall not prohibit or have the effect of prohibiting telecommunications service.'" 08-759 Pet. App. 10a-11a. Thus, the word "may" is properly read in this context not to refer to the possible or conceivable effects of a regulation, but rather to deny permission to States and localities to enforce the types of legal requirements that Section 253(a) forbids. Nothing in the text of Section 253(a) "results in a preemption of regulations which might, or may at some point in the future, actually or effectively prohibit services." 08-626 Pet. App. 30a.

The Eighth and Ninth Circuits' interpretation of Section 253(a) appears to be consistent with that of the FCC. In determining whether a state or local requirement has "the effect of prohibiting the ability" of an entity to provide telecommunications services, the Commission has looked to the "practical effect" of the requirement on the entity. *Public Util. Comm'n of Tex.*, 13 F.C.C.R. 3460, 3470 ¶ 22 (1997) (*Texas PUC Order*).[1]

---

[1] See *California Payphone Order*, 12 F.C.C.R. at 14,209 ¶ 38 (to violate Section 253(a), the city's contracting conduct "would have to actually prohibit or effectively prohibit the ability of a payphone service provider" to offer payphone service); *Petition of Pittencrieff Commc'ns, Inc. for Declaratory Ruling Regarding Preemption of the Tex. Pub. Util. Regulatory Act of 1995*, 13 F.C.C.R. 1735, 1752 ¶ 32 (1997) (declining to preempt where "there is no evidence on this record that these

The mere possibility that a state or local requirement might prevent a telecommunications carrier from providing service is not sufficient to violate Section 253(a).

2. Petitioners argue (08-626 Pet. 12-13; 08-759 Pet. 16) that the Eighth and Ninth Circuits interpreted Section 253(a) to require a provider to prove that it has been completely excluded from providing service in order to establish a successful preemption claim. Such an interpretation would create a serious conflict with the Commission's understanding of Section 253(a), and it would undermine the federal competition policies that the provision seeks to advance. As the Commission has explained, "Congress intended primarily for competitive markets to determine which entrants shall provide the telecommunications services demanded by consumers,"[2] and it enacted Section 253 "to ensure that its national competition policy for the telecommunications industry * * * could not be frustrated by the isolated actions of individual municipal authorities or states." *Texas PUC Order*, 13 F.C.C.R. at 3463 ¶ 4. Because the "goal of opening local markets to competition" can be frustrated "not only [by] express restrictions on entry, but also [by] restrictions that indirectly produce that result," *id.* at 3480 ¶ 41, the Commission has interpreted Section 253(a) to reach any legal barrier that "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment," *California Payphone Or-*

[state universal service contribution] requirements actually have [the] effect" of prohibiting an entity from providing service).

[2] *Silver Star Tel. Co. Petition for Preemption & Declaratory Ruling*, 12 F.C.C.R. 15,639, 15,656-15,657 ¶ 38 (1997), aff'd, 13 F.C.C.R. 16,356 (1998), petition for review denied *sub nom. RT Commc'ns* v. *FCC*, 201 F.3d 1264 (10th Cir. 2000).

der, 12 F.C.C.R. at 14,206 ¶ 31. Contrary to petitioners' arguments, however, the decisions below need not be read as confining the application of Section 253(a) to only those legal requirements that completely bar new entry.

a. The Eighth Circuit made clear in its opinion that a plaintiff need not show a "complete or insurmountable prohibition" to prevail under Section 253(a). 08-626 Pet. App. 31a. Rather, the court, citing the *California Payphone Order*, announced a preemption standard that is substantially similar to the Commission's—*i.e.*, whether the challenged requirement creates "an existing material interference with the ability to compete in a fair and balanced market." *Ibid.*; see *id.* at 32a (stating that the relevant inquiry is "whether the City's ordinance actually or effectively prohibited or materially inhibited Level 3's ability to provide telecommunications services").

Moreover, contrary to Level 3's contention (08-626 Pet. 14, 17-18), nothing in the Eighth Circuit's decision states that existing carriers, such as Level 3, must exit the market before they can bring a Section 253 claim. Instead, the court reviewed the record and found "insufficient evidence from Level 3 of any actual or effective prohibition, let alone one that materially inhibits its operations." 08-626 Pet. App. 32a. The court appears to have accorded inordinate significance to Level 3's inability to "state with specificity what additional services it might have provided" if it were not required to pay St. Louis's license fee. *Ibid.* (quotation marks and citation omitted). That specific failure of proof—which the court of appeals seems to have regarded as emblematic of broader evidentiary deficiencies in Level 3's case—is not central to a proper Section 253(a) inquiry. Nevertheless, because the Eighth Circuit properly stated a pre-

emption standard that is consistent with the Commission's, that shortcoming in its explanation of its decision does not require this Court's correction.

b. Similarly, the decision of the Ninth Circuit can reasonably be understood to reflect a mode of analysis that is consistent with the FCC's interpretation of Section 253. To be sure, that court did not expressly adopt the Commission's "existing material interference" test. Portions of the Ninth Circuit's decision, moreover, could be read to suggest that a Section 253 plaintiff must show effective preclusion—rather than simply material interference—in order to prevail. See 08-759 Pet. App. 8a-9a (noting that, under the *Auburn* standard, which the court overruled, local regulations that "create[] a substantial barrier" to the provision of service would be preempted) (quotation marks and citation omitted). As discussed above, limiting the preemptive reach of Section 253(a) to legal requirements that completely preclude entry would frustrate the policy of open competition that Section 253 was intended to promote.

Notwithstanding those concerns, further review of the Ninth Circuit's decision is not warranted, because the en banc court did not reject the Commission's standard. To the contrary, the court cited the *California Payphone Order* as relevant authority, and it stated that "our interpretation is consistent with the FCC's." 08-759 Pet. App. 11a. In addition, the court determined that San Diego would violate Section 253(a) if it implemented its wireless siting ordinance in a manner that "stall[ed] applications" or "impose[d] an excessively long waiting period," *id.* at 15a. That observation demonstrates the court's recognition that Section 253 can preempt legal requirements that fall short of a complete ban on service. Indeed, because the Ninth Circuit

viewed Sprint's challenge to San Diego's wireless siting ordinance as a facial challenge governed by *United States* v. *Salerno*, 481 U.S. 739 (1987)—under which a plaintiff must show that there is "no set of circumstances" under which the challenged statute would be valid (*id.* at 745)—the court did not foreclose a future challenge to San Diego's ordinance based on evidence that the county is implementing the ordinance in a manner that materially inhibits or limits carriers' ability to provide telecommunications services. 08-759 Pet. App. 15a. For those reasons, there is no sound basis for concluding that the Ninth Circuit's reading of Section 253(a) will frustrate federal competition policy goals.

B. There Is No Conflict Among The Courts Of Appeals That Warrants This Court's Intervention At This Time

1. The Eighth and Ninth Circuits correctly recognized that their view of the Section 253(a) preemption standard differs in some respects from that of the First, Second, and Tenth Circuits. 08-759 Pet. App. 9a; see 08-626 Pet. App. 30a. Although petitioners characterize the differences as "widespread" (08-626 Pet. 24) and "substantial" (08-759 Pet. 13), the courts of appeals in fact agree on the starting point for analysis. The First, Second, and Tenth Circuits, like the Eighth and Ninth Circuits, have correctly cited the Commission's *California Payphone Order* as relevant authority regarding the standard to be applied under Section 253(a). See *Puerto Rico Tel. Co.* v. *Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006); *TCG New York, Inc.* v. *City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002), cert. denied, 538 U.S. 923 (2003); *Qwest Corp.* v. *City of Santa Fe*, 380 F.3d 1258, 1270 (10th Cir. 2004) (*Santa Fe*). Moreover, the First, Second, and Tenth Circuits, like the Eighth

Circuit, have expressly recognized that, under the *California Payphone Order*, a state or local requirement violates Section 253 if it materially inhibits the ability of competitors to provide service, even if it does not completely preclude the provision of service. *Puerto Rico Tel. Co.*, 450 F.3d at 18; *TCG New York*, 305 F.3d at 76; *Santa Fe*, 380 F.3d at 1271.

To be sure, the First, Second, and Tenth Circuits have applied the "materially inhibits" standard through the lens of *Auburn*, under which a legal requirement was subject to preemption if it *might* have had the effect of prohibiting the ability of an entity to provide telecommunications services. See *Puerto Rico Tel. Co.*, 450 F.3d at 18 ("Section 253(a) preempts laws that 'may prohibit or have the effect of prohibiting' the provision of telecommunications services.") (citation omitted); *Santa Fe*, 380 F.3d at 1270 & n.9 (applying *Auburn* standard); *TCG New York*, 305 F.3d at 76 (suggesting that a local government's reservation of the "right to prohibit" service amounts to a violation of Section 253(a)). That approach has led the Second and Tenth Circuits to suggest that Section 253(a) can preempt local ordinances that grant municipal officials discretion to forestall or deny applications for required permits or franchises, even in the absence of any evidence that the officials have actually exercised their discretion in a manner that has harmed competitive entry. *TCG New York*, 305 F.3d at 76-77; *Santa Fe*, 380 F.3d at 1270.[3]

---

[3] The First Circuit has not considered whether the vesting of broad discretion in local decisionmakers constitutes a violation of Section 253(a). In *Puerto Rico Telephone Co.*, the First Circuit concluded that a locality's decision to substantially increase its fees would significantly harm the profitability of the carrier filing suit. 450 F.3d at 18-19. That record-specific determination does not conflict with any decision

Although those courts could be viewed as disagreeing with the Ninth Circuit's conclusion here that the existence of discretion is not by itself sufficient to support preemption, it is significant that, in both *TCG New York* and *Santa Fe*, the providers bringing suit had made initial attempts to invoke the localities' permitting process, rather than challenging the ordinances on their face, as Sprint did in the Ninth Circuit. *TCG New York*, 305 F.3d at 71; *Santa Fe*, 380 F.3d at 1262-1263. Neither the Second nor the Tenth Circuit has invalidated an ordinance without having before it some evidence of the ordinance's practical effect.

More importantly, since the Second and Tenth Circuits' decisions relying on *Auburn* were issued, the Eighth Circuit has declined to follow *Auburn*, and the en banc Ninth Circuit has overruled it. In light of those developments, it is unlikely that additional circuits will follow the repudiated *Auburn* decision, and those that already have done so may reconsider the issue. Indeed, even the petitioners here do not attempt to defend the interpretation of Section 253(a) articulated in *Auburn*. This Court therefore should allow courts of appeals and the Commission to continue to develop the law in this area rather than taking up the issue at this time.

2. The Commission's express statutory authority to preempt state and local legal requirements that violate Section 253(a) provides an additional reason for this Court to deny review in these cases. See 47 U.S.C.

---

of another court of appeals. The Eighth Circuit likewise has not addressed the relevance of local discretion under Section 253(a). The district court in this case found that St. Louis's ordinance did *not* provide local authorities with unfettered discretion over rights-of-way applications, 08-626 Pet. App. 58a, 59a, 65a, but the Eighth Circuit did not address that issue in rejecting Level 3's preemption claim.

253(d). As noted above, the courts of appeals generally agree that the FCC's *California Payphone Order* prescribes the relevant test for determining whether a legal requirement has the "effect of prohibiting the ability of any entity to provide any * * * telecommunications service" (47 U.S.C. 253(a)). Any disagreement among the circuits chiefly involves the application of that test to various types of state and local regulations. If such disagreements cause significant divergence in outcomes among the circuits, the Commission can restore uniformity by issuing authoritative rulings on the application of Section 253(a) to particular types of state and local requirements. Those rulings will govern the disposition of Section 253(a) claims brought in the federal courts. See *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U. S. 967, 982-983 (2005) (holding that an agency's reasonable interpretation of an ambiguous statute is authoritative and binding on the courts of appeals, even those that have previously interpreted the statute differently). The Commission's ability to eliminate any conflict provides an additional reason for this Court to deny review here. Cf. *Braxton* v. *United States*, 500 U.S. 344, 347-349 (1991).

3. The Eighth Circuit noted (08-626 Pet. App. 29a) that its conclusion that Section 253(c) is not an independent basis for preemption, but instead a safe harbor for legal requirements that would otherwise violate Section 253(a), is inconsistent with the approach taken by the Sixth Circuit in *TCG Detroit* v. *City of Dearborn*, 206 F.3d 618 (2000). In *TCG Detroit*, the Sixth Circuit concluded that a municipal franchise fee did not violate Section 253(a), but it then went on to consider whether the fee was "fair and reasonable" under Section 253(c). *Id.* at 624 (quotation marks omitted). Although the Sixth

Circuit did not say so explicitly, its analysis suggests that it viewed Section 253(c) as having independent preemptive force. See *ibid.*

The Eighth Circuit's interpretation of Section 253(c) is correct. As the Commission has observed, Section 253(a) "is the only portion of section 253 that broadly limits the ability of states to regulate. All of the remaining subsections * * * carve out defined areas in which states may regulate." *Texas PUC Order*, 13 F.C.C.R. at 3481 ¶ 44. Thus, Subsection (c) makes clear that "*[n]othing in this section* affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation" so long as those actions fall within the terms of the subsection. 47 U.S.C. 253(c) (emphasis added). The Eighth Circuit was therefore correct when it concluded that Section 253(c) "'derives meaning only through its relationship to [Section 253(a)]'" and "standing alone, 'cannot form the basis of a cause of action against a state or local government.'" 08-626 Pet. App. 29a (quoting *BellSouth Telecomms., Inc.* v. *Town of Palm Beach*, 252 F.3d 1169, 1187, 1189 (11th Cir. 2001)).

The inconsistency between the Eighth Circuit's decision and the Sixth Circuit's analysis in *TCG Detroit* does not warrant this Court's review. The Sixth Circuit's suggestion that Section 253(c) might provide an independent basis for preemption was dicta, since the court ultimately concluded that Section 253(c) did not preempt the challenged local law. See *TCG Detroit*, 206 F.3d at 624-625. No other court of appeals has adopted the Sixth Circuit's approach, and cases in which the courts are asked to apply Section 253(c) independently of Section 253(a) are rare.

C. Neither Petition Presents An Appropriate Vehicle For This Court's Review Of The Questions Presented

1. *No. 08-626.* The petition in No. 08-626 is not an appropriate vehicle for consideration of the Section 253(a) standard because there does not appear to be a fully developed record on the effect of St. Louis's ordinance on the ability of Level 3—or any other competitor—to provide telecommunications services. Although Level 3 challenges various non-fee provisions of St. Louis's ordinance, its principal dispute is with the license fee that St. Louis imposes on the company for access to municipal rights-of-way. The district court, however, did not engage in particularized fact-finding on the effect of any of the challenged provisions on Level 3. Instead, relying on *Auburn*, it simply described the challenged law and then concluded summarily that "the ordinance includes several provisions that in combination have the effect of prohibiting the ability to provide telecommunications services under 47 U.S.C. § 253(a)." 08-626 Pet. App. 49a (quotation marks omitted). The Eighth Circuit likewise did not discuss the record at any length, but simply concluded that Level 3 had failed to meet its burden under Section 253(a). *Id.* at 32a-33a. The undeveloped state of the record is further reflected in Level 3's attempt to reopen discovery after remand in order to "gather further evidence of 'actual or effective prohibition.'" *Id.* at 3a (citation omitted). And the absence of particularized fact-finding is especially problematic because key facts relevant to Level 3's preemption claims appear to be in dispute. See 08-626 Br. in Opp. 2-9 & nn.2, 4, 5, 6. The inadequacy of the evidentiary record provides an additional reason for the Court to deny review in No. 08-626.

2. *No. 08-759.* This case likewise does not appear to present a sufficient record for this Court to consider the standard for preemption under Section 253(a). Neither the district court nor the court of appeals looked beyond the face of San Diego's wireless-siting ordinance to consider its practical effect on the ability of a carrier to provide telecommunications services. 08-759 Pet. App. 14a-16a, 48a, 70a-74a. Thus, as it comes to this Court, the case contains no analysis by the lower courts of the "practical effect," *Texas PUC Order*, 13 F.C.C.R. at 3470 ¶ 22, of the San Diego ordinance on wireless carriers' ability to provide service in a "fair and balanced legal and regulatory environment," *California Payphone Order*, 12 F.C.C.R. at 14,206 ¶ 31.

In addition, No. 08-759 raises an unresolved threshold question: whether Section 253(a) applies to wireless-siting ordinances or whether, instead, such ordinances can be challenged only under Section 332(c)(7). Sprint argues (08-759 Pet. 26 & n.7) that it can "plainly" challenge San Diego's wireless-siting ordinances under Section 253(a) because "Section 253(a) applies to challenges to 'statutes' and 'regulations,' * * * whereas Section 332(c)(7) applies only to challenges to particular 'decisions' made by local authorities." But San Diego contends (08-759 Br. in Opp. 34) that because Section 332(c)(7)(B)(i)(II) refers to state and local "regulation of the placement, construction, and modification" of wireless facilities, Section 332(c)(7) provides the exclusive statutory mechanism for challenging wireless-siting regulations as well as decisions about individual facilities.

The Ninth Circuit found it unnecessary to resolve that question because it construed Sections 253(a) and 332(c)(7)(B)(i)(II) to impose the same preemption standard. See 08-759 Pet. App. 13a. The court might revisit

that conclusion, however, if this Court were to reverse the Ninth Circuit's interpretation of Section 253(a). In addition, the Commission is now considering the relationship between Sections 253(a) and 332(c)(7)(B)(i)(II) in connection with a pending petition for a declaratory ruling.[4] By denying review in this case, the Court would give the expert agency charged with the administration of the statute an opportunity to address that unresolved question.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
MALCOLM L. STEWART
Deputy Solicitor General
ERIC D. MILLER
Assistant to the Solicitor General

P. MICHELE ELLISON
Acting General Counsel
JOSEPH R. PALMORE
Deputy General Counsel
RICHARD K. WELCH
Deputy Associate General Counsel
NANDAN M. JOSHI
Counsel
Federal Communications Commission

MAY 2009

---

[4] CTIA—The Wireless Association's Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, WT Docket No. 08-165 (filed July 11, 2008).

18 (5)

No. 08-759

Supreme Court, U.S.
FILED
FEB 11 2008
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

SPRINT TELEPHONY PCS, L.P.,

Petitioner,

v.

COUNTY OF SAN DIEGO, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CITY OF ST. LOUIS, MISSOURI, IN SUPPORT OF RESPONDENTS

Kenneth A. Brunetti
Counsel of Record
Joseph Van Eaton
Matthew K. Schettenhelm
Miller & Van Eaton, PLLC
Suite 1000
1155 Connecticut Ave., N.W.
Washington, DC 20036
(202) 785-0600

Stephen J. Kovac
Daniel J. Emerson
314 City Hall
St. Louis, MO 63103
(314) 622- 3361

Counsel for City of St. Louis, Missouri

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

I. The Ninth Circuit Rejected a "Preemption-by-Speculation" Approach That Was Both Wrong and Judicially Unmanageable 3

A. The Ninth Circuit Deemed Itself Bound by a "May Prohibit" Standard. 3

B. "May Prohibit" Is Not a Judicially-Manageable Standard for Preemption. 7

C. Sprint and *Amici* Greatly Overstate the Effect of the Ninth Circuit's Elimination of the "May Prohibit" Test. 11

II. The Court Need Not Intervene Where the Record Shows No Meaningful Impact on the Provider's Ability To Provide Service in the Market. 15

CONCLUSION 17

TABLE OF AUTHORITIES

Cases

Altria Group v. Good,
129 S. Ct. 538 (2008) 9

City of Auburn v. Qwest Corp.,
260 F.3d 1160 (9th Cir. 2001) 4

Level 3 Commc'ns v. City of St. Louis,
405 F. Supp. 2d 1047 (E.D. Mo. 2005) 8

Level 3 Commc'ns, L.L.C. v. City of St. Louis,
477 F.3d 528 (8th Cir. 2007) 12, 14

Qwest Commc'ns Inc. v. City of Berkeley,
433 F.3d 1253 (9th Cir. 2006) 6

Qwest Corp. v. City of Portland,
200 F. Supp. 2d 1250 (D. Or. 2002) 4

Qwest Corp. v. City of Portland,
2006 WL 2679543 (D. Or. 2006) 6, 8

Qwest Corp. v. City of Portland,
385 F.3d 1236 (9th Cir. 2004) 5

Sprint Telephony PCS, L.P. v. County of San Diego, 377 F. Supp. 2d 886 (S.D. Cal. 2005) 6

Statutes

47 U.S.C. § 253 ..... passim

Other Authorities

In re California Payphone Association,
12 F.C.C.R. 14191 (1997) 12, 13

In re Classic Telephone,
11 F.C.C.R. 13082 (1996) 10

In re TCI Cablevision of Oakland County, Inc., 12 F.C.C.R. 21396 (1997) 13

INTEREST OF *AMICUS CURIAE*

The City is the Respondent in *Level 3 Communications, LLC, v. City of St. Louis*, No. 08-626.[1] That case was distributed for conference on December 30, 2008. The Petitioner in this case, Sprint Telephony PCS, L.P. ("Sprint"), has asked the Court to consider the two petitions together. Level 3 Communications, LLC ("Level 3"), filed an *amicus curiae* brief in this case asking the Court, among other things, not to consolidate the cases. Given the intermingling of the petitions, the City has a significant interest in ensuring that the Court is fully apprised as to what is at issue in both cases. The Court has not yet ruled on Level 3's petition for certiorari in Case No. 08-626.

SUMMARY OF ARGUMENT

For the same reason Level 3's petition should be denied in Case No. 08-626, Sprint's petition should be denied here. The Eight and Ninth Circuits correctly interpreted 47 U.S.C. § 253 according to its plain language, which also comports with the FCC's interpretation of the statute. There is no reason to

---

[1] Pursuant to Rule 37.2, all parties have consented to the filing of this brief, and letters evidencing such consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, the City affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

depart from that plain language or to review a case that clearly and correctly applies it.

Section 253(a) provides that no state or local law or legal requirement "may prohibit or have the effect of prohibiting" the ability of any entity to provide telecommunications services. 47 U.S.C. § 253(a). In this case, the Ninth Circuit has made a simple and entirely appropriate correction to its earlier reading of Section 253(a), which had led some courts in the Circuit to conclude that the statute's use of the word "may" meant that the statute was violated if an ordinance *might*, under any possible circumstances, prohibit or effectively prohibit any entity from providing telecommunications service. In *Sprint*, the Ninth Circuit followed the Eighth Circuit in recognizing "may" means "is permitted to" not "might."

Both Sprint and Level 3 would have this Court assume that this simple correction places the Eighth and Ninth Circuit at odds with other Circuits. In fact, while the two cases are quite different in many important respects (as Level 3's *amicus* brief points out), the unifying factors are that: (a) in neither case did the company present any evidence that would suggest that the challenged regulations had any impact on it; and (b) in both cases, the local government defendants presented evidence that the challenged regulations were not prohibiting or effectively prohibiting the company from providing any services. Neither company showed that any Circuit would have upheld a

Section 253(a) challenge under such circumstances. There is no reason to grant certiorari in this case, just as there is no reason to do so in *Level 3*.

I. The Ninth Circuit Rejected a "Preemption-by-Speculation" Approach That Was Both Wrong and Judicially Unmanageable.

Over the course of the past decade, the Ninth Circuit developed and deemed itself "bound" by a reading of Section 253(a) that was utterly confusing to the courts and demonstrably wrong as a matter of linguistics. The decision below is best understood as a modest but important change in course. Sprint and *amici* greatly mischaracterize it.

A. The Ninth Circuit Deemed Itself Bound by a "May Prohibit" Standard.

The "may prohibit" standard reversed in *Sprint* had humble beginnings. In *Auburn*, the Ninth Circuit borrowed the sentence that would become the heart of the circuit's "may prohibit" test from a vacated district court decision from another circuit:

> Section 253(a) preempts "regulations that not only 'prohibit' outright the ability of any entity to provide telecommunications services, but also those that 'may . . . have the effect of prohibiting' the provision of such services."

City of Auburn v. Qwest Corp., 260 F.3d 1160, 1175 (9th Cir. 2001) (quoting *Bell Atl. v. Prince George's County,* 49 F. Supp. 2d 805, 814 (D. Md. 1999), *vacated and remanded on other grounds,* 212 F.3d 863 (4th Cir. 2000)). The district court's use of ellipsis, or the Ninth Circuit's reliance on it, may not have been intended to change the meaning of Section 253(a) in any substantive way. However, one year later, a district court in the Ninth Circuit vigorously objected to Qwest's claim that "may prohibit" was the substantive standard for preemption. Describing the phrase quoted in *Auburn*, the district court wrote:

> The quoted phrase simply misreads the plain wording of the statute, and implies that the statute bars not only those local requirements that actually prohibit or have the effect of prohibiting the ability to provide telecommunication service, but also those local requirements that *may* have that effect. That is not what the statute says. . . . A correct reading of the statute shows that Congress used the word "may" as a synonym for "is permitted to."

Qwest Corp. v. City of Portland, 200 F. Supp. 2d 1250, 1255 (D. Or. 2002) (internal citations omitted).

Of course, the district court had it precisely correct. However, the Ninth Circuit reversed the district court, finding that both the district court and

the court of appeals were "bound" by the "may prohibit" test – "like it or not":

> We have previously ruled that regulations that *may* have the effect of prohibiting the provision of telecommunications services are preempted. Like it or not, both we and the district court are bound by our prior ruling.

Qwest Corp. v. City of Portland, 385 F.3d 1236, 1241 (9th Cir. 2004) (emphasis in original).

Hence, the "may" standard became a *substantive* standard for interpretation, complicated by the fact that the *Portland* court did not explain what the term meant. In remanding the case to the district court, the Ninth Circuit suggested that the court was to make findings – suggesting that the "may" standard could require some showing of material effects. In other cases, however, the language of the court could have been read to mean that a prohibition could be established by court speculation. Thus, in 2006, the Ninth Circuit found that a City of Berkeley ordinance violated Section 253(a):

> The City argues Qwest failed to produce any facts showing how any section or combination of sections of [the ordinance] does what § 253(a) precludes – prohibiting or having the effect of

> prohibiting telecommunications service. . . . However, we explicitly rejected this argument in *Qwest Corp. v. City of Portland*. . . . [R]ather than considering the actual impact of [the Ordinance], we must determine whether the specific regulations . . . 'may have the effect of prohibiting the provision of telecommunications services' in the City.

Qwest Commc'ns Inc. v. City of Berkeley, 433 F.3d 1253, 1256-57 (9th Cir. 2006).

Not surprisingly given the muddle created by these decisions, the district courts also approached the "may" standard in dramatically different ways. On remand, the *Portland* court found that the "may" standard required a showing of significant economic impact. *Qwest Corp. v. City of Portland,* 2006 WL 2679543, *2-3 (D. Or. 2006). In this case, the district court allowed a facial challenge to move forward where there was *no* evidence of any prohibitory effects or even significant impacts. *Sprint Telephony PCS, L.P. v. County of San Diego,* 377 F. Supp. 2d 886, 893-96 (S.D. Cal. 2005). Rather, it was enough that Sprint list a number of requirements, characterize them as burdensome, and then say that the burdens "may" be a prohibition.

B. "May Prohibit" Is Not a Judicially-Manageable Standard for Preemption.

The decision below recognizes that the "may prohibit" standard is not only technically wrong as a matter of plain language interpretation; it is judicially unmanageable. The standard encourages telecommunications providers to challenge any local requirement they find objectionable, regardless of whether the requirement had a meaningful impact on competition or on any competitor. The speculative standard forces Article III courts to answer questions that they are not well-suited to answer without factual context.[2]

The district courts in the Ninth Circuit rightly expressed their concern with a "preemption-by-speculation" approach. As the *Portland* district court put it in deciding that the "may" standard required more than speculation:

> [A]lmost any regulation, considered in the abstract ***without factual context***, could be depicted as potentially

---

[2] It is obviously true that in some cases a "prohibition" can be established on the face of a statute – as where a statute purports to limit the number of providers that can offer service in a particular geographic area. It is likewise true that in some cases, the existence of an "effective prohibition" may not be contested, and factual development may not be necessary to resolve a case. Like *Level 3*, this case involves allegations of prohibition or effective prohibition that was contested by a local government that showed that there had been no prohibition or effective prohibition.

> prohibiting a telecommunications service. A $5.00 application fee would be prohibitory if the applicant had only $2.00. Unless the preemption analysis is ***somehow connected to reality,*** a telecommunications provider could rely on purely hypothetical scenarios to establish a violation of § 253(a).

Qwest v. Portland, 2006 WL 2679543 at *2 (D. Or. 2006) (emphasis added), *see id.* at *3 (noting challenge must have "basis in economic realty").

In rejecting the "may" standard, the Ninth Circuit properly rejects preemption by speculation, and restores the "connect[ion] to reality" that Section 253(a)'s plain language requires. Without it, judges find themselves making abstract decrees of "prohibitions" based only on judicial speculation. *See, e.g., Level 3 Commc'ns v. City of St. Louis*, 405 F. Supp. 2d 1047, 1056 (E.D. Mo. 2005) (listing City requirements and declaring, without analysis, that the court "believes" the requirements run afoul of Section 253(a)).

The problems associated with the preemption by speculation standard are perhaps best illustrated by Sprint's Petition in this case. Among other things, to show how the Ninth Circuit's decision fails to protect it, Sprint complains to this Court that San Diego County required it (and other providers) to use

"graffiti-resistant coatings" on wireless cabinets.[3] *See* Pet. 5; Pet. App. 111a. Sprint does not point to any record evidence that shows that this requirement is actually burdensome. Nothing in the record indicates the requirement has or is likely to have a material "effect" on Sprint's ability to compete in San Diego. This Court, like the courts below, is left to speculate about that "effect":

- Does painting really create a burden?
- If it does, is it really a significant burden?
- How difficult and time-consuming would it be for a provider to apply such paint?

The problem is not resolved if the court were to decree that anything that seems (to the court) to impose a "substantial burden" should be preempted. First, this would likely lead to an excessively broad preemption, a reading inconsistent with this Court's preemption teachings. *Altria Group v. Good*, 129 S. Ct. 538, 543 (2008). But perhaps even more troubling, such a holding would only further ensnare the courts in assessing the reasonableness and the burdens of various local requirements:

---

[3] A wireless installation does not usually involve only an antenna. Rather, there will often be large cabinets or other structures, housing the electronic devices associated with the antennas.

- Can *any* paint be required or are *all* paint requirements too burdensome?

- Does Section 253 require local governments to incur the cost of cleaning and shielding wireless facilities free of charge to the provider?

- Can the company be required to remove graffiti?

Quite literally, every legal requirement that obligates a provider to do anything – even, for example, obeying traffic signals or heeding antidiscrimination laws, would be subject to challenge. The path leads to endless litigation and has very little to do with Section 253 itself.[4] To be sure, Congress could have crafted a statute that broadly preempted *any and all* local requirements regardless of whether they "prohibit" or effectively achieve that result. But Section 253(a) does no such thing. The Ninth Circuit rightly returned the standard for preemption to one that is judicially manageable – Section 253's plain language.

---

[4] Sprint incorrectly argues that its challenge and similar challenges to local governments would not implicate Section 253(b). The FCC explicitly ruled that Section 253(b) does apply to local governments. *In re Classic Telephone*, 11 F.C.C.R. 13082, 13100 ¶ 34 (1996).

C. Sprint and *Amici* Greatly Overstate the Effect of the Ninth Circuit's Elimination of the "May Prohibit" Test.

Sprint and *amici* wrongly cast the Ninth Circuit's decision to eliminate the "may prohibit" test as doing something much more draconian. According to Sprint and *amici*, the Ninth Circuit ruled that Section 253 preempts a local requirement only if it effects a "complete ban" on the provision of such service. Pet. 16, 17; *see also* Brief of *Amici Curiae* NextG Networks of Cal., Inc. and the DAS Forum, 7 (indicating that under Ninth Circuit's standard, cities may "impose any requirement and take any action so long as it does not lead to a specific construction permit denial"). The Ninth Circuit said precisely the opposite. Pet. App. 11a. The court held that under Section 253(a), a provider must show "actual ***or effective***" prohibition. *Id.* (emphasis added). The Ninth Circuit's change in Section 253(a) is thus not one that preempts "complete bans" while preserving requirements that will "effectively" achieve the same result.

Contrary to Sprint's arguments (and those of Level 3),[5] the court noted that its standard was

---

[5] Sprint correctly concedes that the Eighth Circuit also adopted a test consistent with the FCC test, Pet. 15, a point that Level 3 tried to obscure. Level 3 Reply Br. 10. Sprint also argues, incorrectly, that the Eighth Circuit thought that the "effective prohibition" standard was less rigorous than the "material impact" standard. Pet. 16. Rather, the Eighth Circuit formulation correctly recognized that Section 253 requires (a) a prohibition or effective prohibition; (b) of the ability of an entity

consistent with the FCC's. Pet. App. 11a. The FCC has clearly noted that there are *two* distinct inquiries under Section 253(a). *In re Cal. Payphone*, 12 F.C.C.R. 14191, 14204-14206 ¶¶ 27, 30-31 First, the FCC asks whether a local requirement serves as an "express legal prohibition" that "completely bar[s] prospective competitors from lawfully providing . . . service." *Id.* ¶ 30. But this does not end the analysis. Even if there is no express bar, the FCC proceeds to assess whether a local requirement "has the effect of prohibiting" the ability to provide service. *Id.* ¶ 31. To do so, the FCC asks whether the local requirement "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *Id.* A fact-finder must assess the "practical effect" of a local requirement. *Id* ¶ 27. A plaintiff challenging a local requirement bears the burden:

> Parties seeking preemption of a local legal requirement . . . must supply us with *credible* and *probative evidence* that the challenged requirement falls

---

to provide any telecommunications service. The court properly recognized that there was no prohibition or effective prohibition of any kind, let alone one that had a material effect on the ability to provide telecommunications service. *Level 3 Commc'ns, L.L.C. v. City of St. Louis*, 477 F.3d 528, 534 (8th Cir. 2007). Sprint's graffiti complaint is an illustration of another requirement where there was no evidence of (and it is hard to imagine) any prohibition, much less an impact on the provision of telecommunications services.

> within the proscription of Section 253(a).

In re TCI Cablevision of Oakland County, Inc., Memorandum Opinion and Order, 12 F.C.C.R. 21396 at 21440, ¶ 101 (1997) (emphasis added).[6]

---

[6] Contrary to Level 3's *amicus* arguments, this evidentiary requirement is not merely something mentioned in the FCC guidelines for Section 253 complaints. Amicus Curiae Brief 5, n.2. The FCC expressly declined to find that Section 253 preempts legal requirements in the absence of an assessment of how those requirements have been applied:

> CPA further argues that the City's very involvement in the contracting process for installing payphones outdoors on the public rights-of-way "amounts to an arbitrary and potentially absolute barrier to entry" proscribed by section 253(a). We cannot agree that the City's exercise of its contracting authority as a location provider constitutes, *per se*, a situation proscribed by section 253(a). The City's contracting conduct would implicate section 253(a) only if it materially inhibited or limited the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment in the market for payphone services in the Central Business District. In other words, the City's contracting conduct would have to actually prohibit or effectively prohibit the ability of a payphone service provider to provide service outdoors on the public rights-of-way in the Central Business District. As described above, the present record does not permit us to conclude that the City's contracting conduct has caused such results.

12 F.C.C.R. 14209 at ¶ 38.

Like the FCC, the Ninth Circuit simply requires a provider to make a basic factual showing that the requirement – such as the need for "graffiti-resistant" paint – effectively prohibits it from providing service. Here, Sprint failed to make any showing of an effective prohibition, much like Level 3 failed to make any showing of an adverse effect in Case No. 08-626.

The Ninth Circuit rightly steers away from the incorrect and unmanageable "may" standard by adopting the Eighth Circuit's plain language interpretation of Section 253:

> We therefore overrule *Auburn* and join the Eighth Circuit in holding that 'a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition.'

Pet. App. 11a (citing *Level 3 Commc'ns, L.L.C. v. City of St. Louis*, 477 F.3d 528, 532 (8th Cir. 2007)). As a result, the Ninth Circuit adopts a standard that is aligned with the FCC and that, contrary to Sprint's claim, gives effect to *both* prongs of Section 253(a)'s test. When this standard is applied to the record, Sprint's abstract challenge to the County's basic local requirements – like Level 3's challenge to the City of St. Louis's requirements – is exposed as utterly meritless.

Much like Level 3, Sprint does not offer any serious argument that the plain language interpretations of Section 253 is wrong – only that the statute ought to be interpreted differently to make it (in Sprint's view) more beneficial. This does not justify departure from the plain language. Given the recent trend of decisions that have interpreted Section 253 correctly, the Court need not intervene.

II. The Court Need Not Intervene Where the Record Shows No Meaningful Impact on the Provider's Ability To Provide Service in the Market.

Once the "may prohibit" test is correctly set aside, it becomes clear that these cases are not about conflicting legal standards, but the lack of relevant facts. While there are many important differences between the *Level 3* and *Sprint* cases, the reason both providers ask the court to adopt a standard divorced from the statute's plain language is clear: these cases involved significant showings of facts by defendants that the claim of the plaintiff lacked merit, and no substantive counter by the plaintiff.

Just as we have shown with respect to Level 3, *see* City of St. Louis's Brief in Opposition, Case No. 08-626, at 19-25, Sprint has fallen far short of showing anything approaching a prohibition or effective prohibition. Sprint does not discuss the impact of the County's requirements; it merely lists them. Pet. 24. In contrast, the County of San Diego,

like the City of St. Louis,[7] provided the courts with evidence of the ordinance's lack of "prohibitory" impact. For example, the County showed that of the ten (10) permit applications Sprint had submitted under the ordinance, the County had already granted six (6) of them. County's Supplemental Excerpts of the Record at 50, ¶ 4. The County also pointed out that not one of Sprint's applications had been denied, and that there was no evidence in the record indicating that the County was responsible for any processing delays. County Petition for Panel Rehearing and Rehearing *En Banc* at 5 (9th Cir. Apr. 3, 2007).

---

[7] As we said St. Louis's Brief in Opposition at 20:

> Level 3 was in the market, and had been operating pursuant to the St. Louis ordinance for some years and was rolling out new services in the City. There was no evidence that it was being forced to leave the market, or to cut back service. Level 3 was unable to identify any service it had been prohibited or effectively prohibited from providing, and admitted that, "it cannot be determined what services Level 3 might have provided or developed" with the money it paid the City. C.A.J.A. 384. The City further showed that it has never attempted to limit the types of telecommunications services that Level 3 can provide, C.A.J.A. 416. C.A.J.A. 397-98. It showed, more generally, that the market was highly competitive.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Kenneth A. Brunetti
Counsel of Record
Joseph Van Eaton
Matthew K. Schettenhelm
Miller & Van Eaton, PLLC
Suite 1000
1155 Connecticut Ave., N.W.
Washington, DC 20036
(202) 785-0600

Stephen J. Kovac
Daniel J. Emerson
314 City Hall
St. Louis, MO 63103
(314) 622- 3361

Counsel for City of St. Louis, Missouri

February 11, 2009

4263\13\00145485.DOC

114

(2)

No. 08-759

Supreme Court, U.S.
FILED
DEC 31 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SPRINT TELEPHONY PCS, L.P.,

Petitioner,

v.

SAN DIEGO COUNTY, CALIFORNIA, ET AL,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF LEVEL 3 COMMUNICATIONS, LLC, IN SUPPORT OF NEITHER PARTY

Rex S. Heinke
Michael C. Small
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
2029 Century Park East,
Suite 2400
Los Angeles, CA 90067
(310) 229-1000

Thomas C. Goldstein
Counsel of Record
Anthony T. Pierce
W. Randolph Teslik
Patricia A. Millett
Tobias E. Zimmerman
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036
(202) 887-4000

December 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

BRIEF *AMICUS CURIAE* OF LEVEL 3 COMMUNICATIONS, LLC 1

CONCLUSION 8

TABLE OF AUTHORITIES

Cases

City of Rancho Palo Verdes v. Abrams, 544 U.S. 113 (2005) 5

Puerto Rico Telephone Co. v. Municipality of Guayanilla, 450 F.3d 9 (1st Cir. 2006) 4

Qwest Corp. v. City of Santa Fe, 380 F.3d 1258 (10th Cir. 2004) 4

TCG Detroit v. City of Dearborn, 206 F.3d 618 (6th Cir. 2000) 3

TCG NY, Inc. v. City of White Plains, 305 F.3d 67 (2d Cir. 2002) 4

United States v. *Salerno*, 481 U.S. 739 (1987) 5

Pending Petitions

No. 08-108, *Flores-Figueroa v. United States* 4

No. 08-5316, *Mendoza-Gonzales v. United States* 4

Statutes

Telecommunications Act of 1996:

Section 253(a) 2, 3

Section 253(c) 1, 2, 4

Section 332(c)(7) 3

INTEREST OF *AMICUS CURIAE*

Amicus curiae Level 3 Communications, LLC, is the petitioner in a pending petition for certiorari (No. 08-626, *Level 3 Communications, LLC v. City of St. Louis, Mo.*) discussed in the petition for certiorari in this case.

BRIEF *AMICUS CURIAE* OF LEVEL 3 COMMUNICATIONS, LLC[1]

Amicus is the petitioner in No. 08-626, *Level 3 Communications, LLC v. City of St. Louis, Mo.* (hereinafter, *Level 3*). *Amicus* agrees with the petitioner in this case that the decision of the Ninth Circuit (like the decision of the Eighth Circuit that it expressly adopts) directly implicated an important and recurring circuit conflict and seriously misreads the Telecommunications Act of 1996. Those decisions cannot be reconciled with the plain text of the statute or the pro-competitive purpose underlying its enactment. Nor, as petitioner Sprint explains (at 19-20), do those rulings draw any support from the

---

[1] Pursuant to Rule 37.2, all parties have consented to the filings of this brief, and letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

position of the Federal Communications Commission.[2]

Amicus nonetheless disagrees with the contentions of petitioner Sprint that its petition (hereinafter, *Sprint*) presents a better vehicle than *Level 3* to resolve the recurring conflicts in the circuits over the proper construction of Section 253 of the Telecommunications Act of 1996, or alternatively that the cases should both be granted and consolidated for briefing and argument. *See Sprint* Pet. at 26-28, For six reasons, it would be unwise for the Court to grant certiorari in this case rather than *Level 3*. Nor should the Court consolidate the two together.

---

[2] Indeed, in *Level 3*, respondent City of St. Louis acknowledges that the standard applied by the Ninth Circuit prior to its recent en banc ruling in *Sprint* – which broadly applied Section 253 to find preemption – "has been used by the FCC and other courts." *Level 3* BIO 26. St. Louis nonetheless argues that the FCC supports the City's position in light of "suggested guidelines" in which the FCC requests information on the "specific telecommunications service or services . . . the petitioner [is] prohibited or effectively prohibited from providing." *Id.* at 18 (quoting 13 F.C.C.R. 22970 (1998)). But that request for information is not equivalent to a legal standard for proving preemption. St. Louis also omits the FCC's caution that "not all questions will be relevant to all petitions" (13 F.C.C.R. 22971), as well as its directive that parties submit information on factors that the Eighth and Ninth Circuits would deem irrelevant, such as "whether price levels in the market preclude recovery of any such additional costs" and "cumulative adverse effects of requirements flowing from multiple local regulatory regimes" across the country (*id.* at 22972).

First, only *Level 3* presents the Court with the opportunity to resolve the conflict with the Sixth Circuit's holding in *TCG Detroit v. City of Dearborn*, 206 F.3d 618 (6th Cir. 2000), that Section 253(c) provides an independent basis for finding preemption under the Telecommunications Act, without regard to whether the challenged ordinance runs afoul of Section 253(a). The Eighth Circuit squarely acknowledged that conflict and, in response to Level 3's argument, passed upon the issue. No. 08-626 Pet. App. 28a.[3]

Second, and relatedly, the proper construction of Section 253(a) cannot be understood without reference to the exception provided by Section 253(c). *See Level 3* Pet. for Cert. 20-21; *Level 3* Cert. Reply 4-6. Thus, a significant argument of telecommunications providers in support of preemption under Section 253 is that the proper measure of whether a fee effectively prohibits a telecommunications service is whether it is "fair and reasonable" within the meaning of Section 253(c). Because Sprint has avowedly abandoned all reliance on Section 253(c) (*see Sprint* Pet. for Cert. 28 n.10), granting only its petition threatens to either distort or leave unresolved the preemptive effect of Section 253. In an analogous circumstance, the Court

---

[3] In its brief in opposition in *Level 3*, St. Louis asserts that the Eighth Circuit "did not interpret or apply Section 253(c)." *Level 3* BIO 12. In fact, as the City elsewhere recognizes, the court of appeals squarely "ruled that Section 253(c) does not independently limit local government action." *Id.* at 11 (citing Pet. App. 28a-29a). That ruling directly responded to petitioner's submissions. *See Level 3* Pet. App. 28a.

recently granted certiorari in No. 08-108, *Flores-Figueroa v. United States*. Although the Solicitor General had acquiesced to certiorari in an earlier-filed petition presenting the same question (No. 08-5316, *Mendoza-Gonzales v. United States*), the petitioner in *Flores-Figueroa* presented a more complete set of arguments in support of the defendants' construction of the statute at issue in that case. *See Flores-Figueroa* Cert. Reply 2-4.

Third, the *Level 3* petition more directly presents the circuit conflict over the proper construction of Section 253(a). The decisions of other circuits affording broad preemptive effect to Section 253 all involve local regulations governing telecommunications providers' access to public rights-of-way. *Puerto Rico Telephone Co. v. Municipality of Guayanilla*, 450 F.3d 9 (1st Cir. 2006); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004); *TCG NY, Inc. v. City of White Plains*, 305 F.3d 67 (2d Cir. 2002). That is the factual context in which the *Level 3* petition arises, and that petition accordingly presents the Court with the benefits that come from the percolation in the lower courts of the question of when such measures violate Section 253. The *Level 3* petition (at 32-33 & n.6) also collects the significant array of similar litigation that is pending in the lower courts.

Sprint, by contrast, involves the rules governing the siting of wireless telecommunications equipment, a distinct factual context that has not been the subject of conflicting appellate rulings or equivalent percolation. Importantly, *Sprint* does not present the recurring question, on which the courts of appeals are divided, of the scope of a local government's authority

to charge licensing fees for access to public rights-of-way.

Fourth, *Sprint* presents a potentially significant complication that could prevent this Court from resolving the proper construction of Section 253. A separate provision of the Telecommunications Act, Section 332(c)(7), directly governs "local zoning authority" over "[m]obile services" and provides that a local regulation "shall not prohibit or have the effect of prohibiting the provision of personal wireless services." The respondent county in *Sprint* contends that the case is properly resolved under Section 332(c)(7), not Section 253. Although there is certainly overlap between the provisions, the former is limited to competition in "personal wireless services." Section 332(c)(7) moreover contains no equivalent to Section 253(c)'s restriction of local regulation to "fair and reasonable compensation." Further, Section 332(c)(7) contains its own distinct set of procedural requirements. *See City of Rancho Palo Verdes v. Abrams*, 544 U.S. 113 (2005).

Fifth, *Sprint* also is an inappropriate vehicle in which to resolve the proper construction of Section 253 because the case was framed in the Ninth Circuit as a "facial challenge" to San Diego's regulatory scheme. As a consequence, *Sprint* presents the unusual overlay – raised in few if any other cases involving Section 253 – of the proper role of "the rule of *United States* v. *Salerno*, 481 U.S. 739 (1987), under which a claimant must show that 'no set of circumstances exists under which the [challenged statute] would be valid.'" *Sprint* Pet. for Cert. 11 (alteration in original). The respondent city in *Sprint* is thus sure to argue that the Court need not resolve

the proper construction of Section 253 in that case because its regulatory scheme can at the least be lawfully applied in appropriate circumstances.

Sixth, and more broadly, *Sprint* is a poor vehicle for resolving the scope of Section 253, because there is no record in that case of how the challenged wireless regulation functions in practice. Rather, Sprint challenged the regulation soon after it went into effect. *See Sprint* Pet. App. 4a. The petitioner in *Level 3*, by contrast, operated for several years under the St. Louis regulatory scheme.

The remaining question is whether certiorari should be granted in both *Level 3* and *Sprint* and the two consolidated for briefing and argument. As the example of the *Flores-Figueroa* and *Mendoza-Gonzales* petitions illustrates, *see supra* at 3-4, this Court's general practice is not to grant review in multiple cases presenting the same question. Sprint presents no substantial basis for departing from that practice here. If certiorari is granted in *Level 3*, Sprint no doubt will file an *amicus* brief on the merits, which could bring to the Court's attention any special considerations relating to wireless telecommunications services.

There would moreover be a material cost to adopting Sprint's proposal to hear the cases together. The parties in *Level 3* coordinated the briefing schedule in that case to present this Court with the opportunity, if it granted certiorari, to decide the case this Term. Level 3 thus filed its petition early and the City of St. Louis took only an abbreviated extension of time to respond. The case accordingly is scheduled to be consid red at the Court's Conference of January 16, 2009, which is likely to be the last

opportunity for cases to be set for argument this Term.

By contrast, in *Sprint*, the petitioner took all of its available time before filing its petition, and the respondent has taken a thirty-day extension of time to respond. As is illustrated by No. 08-645, *Abbott v. Abbot*, Sprint could have filed its petition as late as mid-November and still guaranteed that its case was available for Conference in mid-January. But it elected not to do so. *Sprint* accordingly will likely not be set for Conference until March 20, 2009. If the two petitions were granted on that date, the cases likely would not be argued until November 2009 and not decided until the Spring of 2010. Sprint's suggestion thus invites nearly a year of additional delay.

It would be inadvisable to so significantly defer resolving this important question. Both Level 3 and Sprint agree that the issue is of surpassing interest to the telecommunications industry. The current uncertainty over the scope of permissible local regulation "necessitates *immediate* intervention." *Sprint* Pet. for Cert. 23 (emphasis added). Local governments have a similarly significant interest in finally securing certainty regarding the scope of their regulatory authority. That is no doubt why St. Louis opposes Sprint's request as well. *See Level 3* BIO 37 n.23. Indeed, as the *Level 3* petition demonstrates (at 32 n.6), there is a wide array of litigation over the proper scope of Section 253 now pending in the district courts. The efficient disposition of those cases would be materially advanced by a prompt ruling by this Court.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari in No. 08-626, *Level 3 Communications, LLC v. City of St. Louis, MO.* The Court should hold the petition in this case and dispose of it as appropriate in light of its decision in *Level 3.*

Respectfully submitted,

Rex S. Heinke
Michael C. Small
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
2029 Century Park East, Suite 2400
Los Angeles, CA 90067
(310) 229-1000

Thomas C. Goldstein
Counsel of Record
Anthony T. Pierce
W. Randolph Teslik
Patricia A. Millett
Tobias E. Zimmerman
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4000

December 2008

117 (4) No. 08-759

Supreme Court, U.S.
FILED
JAN 12 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SPRINT TELEPHONY PCS, L.P.,

Petitioner,

v.

COUNTY OF SAN DIEGO, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* NEXTG NETWORKS OF CALIFORNIA, INC. AND THE DAS FORUM IN SUPPORT OF PETITION

T. SCOTT THOMPSON
Counsel of Record
LESLIE MOYLAN
DAVIS WRIGHT TREMAINE, LLP
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20006
(202) 973-4200

Attorneys for Amici Curiae

220445

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT IN SUPPORT OF GRANTING THE PETITION 4

I. BACKGROUND ON NEXTG, THE DAS FORUM, AND DISTRIBUTED ANTENNA SYSTEMS ("DAS") 4

II. THE COURT'S INTERPRETATION OF SECTION 253 IS IMPORTANT AND WILL HAVE WIDE IMPACT 6

III. THE NINTH CIRCUIT EN BANC DECISION, IF NOT OVERTURNED, WILL HAVE SIGNIFICANT ADVERSE EFFECTS ON DEPLOYMENT OF NEW TECHNOLOGIES AND COMPETITIVE SERVICES 10

A. The Intent Of Congress In Enacting The Telecommunications Act Of 1996 Was To Promote Deployment Of Advanced Technologies And Competitive Services 10

Contents

Page

B. The Ninth Circuit's New Decision Interprets Section 253 In Conflict With The Language And Intent Of Congress 14

1. The Ninth Circuit's En Banc Interpretation Of Section 253 Ignores Well-Established FCC And Court Precedent, As Well As The Intent Of Congress In Enacting The TCA 15

C. The Ninth Circuit's Decision Will Deter The Deployment Of New Technologies And Competitive Services 19

D. The Court's Review Is Needed To Provide Clarity Regarding The Rights Of Wireline Providers Using The Public Rights-Of-Way 21

CONCLUSION 25

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

AT&T Commc'ns of Southwest, Inc. v. City of Dallas, 8 F. Supp. 2d 582 (N.D. Tex. 1998) 22

City of Auburn v. Qwest Corp., 260 F.3d 1160 (9th Cir. 2001) ..... *passim*

NextG Networks of Cal., Inc. v. City and County of San Francisco, Case No. C 05 0658 MHP, 2006 U.S. Dist. LEXIS 36101 (N.D. Cal. June 2, 2006) 7

Nixon v. Missouri Mun. League, 541 U.S. 125 (2004) 18

Puerto Rico Tel. Co. v. Municipality of Guayanilla, 450 F.3d 9 (1st Cir. 2006) 16

RT Commc'ns, Inc. v. Federal Commc'ns Comm'n, 201 F.3d 1264 (10th Cir. 2000) 16

Sprint Telephony PCS, LP v. San Diego County, 543 F.3d 571 (9th Cir. 2008) 1, 14, 16, 20

TCG New York, Inc. v. City of White Plains, 305 F.3d 67 (2d Cir. 2002) 16, 17, 22, 24

Cited Authorities

Page

ADMINISTRATIVE CASES

E911 Requirements For IP-Enabled Serv. Providers, 20 F.C.C.R. 10245 (Jun. 03, 2005) (separate statement of Comm'r Jonathan S. Adelstein) 12

In re California Payphone Ass'n, 12 F.C.C.R. 14191 (1997) 17

In re CommNet Commc'ns Network, Inc., Order, DA 07-2032, 2007 FCC LEXIS 3746 (FCC May 9, 2007) 12

In re Inquiry Concerning the Deployment of Adv. Telecomms. Capability to all Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to the Telecomms. Act of 1996, Fifth Report, 23 F.C.C.R. 96615 (Jun. 12, 2008) ... 12

In re NextG Networks of Cal., Inc., CPUC Decision 03-01-061, 2003 WL 288990 (Cal. P.U.C. January 30, 2003); *modified*, CPUC Decision D.07-04-045 (Cal. P.U.C. 2007) 4

In re Public Util. Comm'n of Texas, 13 F.C.C.R. 3460 (1997) 24

Cited Authorities

Page

In re State of Minnesota,
14 F.C.C.R. 21697 (1999) 24

TCI Cablevision of Oakland County, Inc.,
12 F.C.C.R. 21396 (1997) 14, 22

FEDERAL STATUTES

47 U.S.C. § 157(a) 11

47 U.S.C. § 253(a) ..... *passim*

47 U.S.C. § 253(b) 13

47 U.S.C. § 253(c) 13, 14

Pub. L. No. 104-104, 110 Stat. 56 (1996) 2, 10

Pub. L. No. 104-104, § 706(a), 110 Stat. 153
(1996) 11

Pub. L. No. 104-104, § 706(b), 110 Stat. 153
(1996) 11

STATE STATUTES

Cal. Pub. Util. Code § 7901 22

Cited Authorities

Page

MUNICIPAL REGULATIONS

City Of Huntington Beach, Cal., Municipal Code § 230.96 (available at http://www.surfcity-hb.org/files/users/city_clerk/Chp230.pdf 8

MISCELLANEOUS

Jonathan S. Adelstein, Comm'r, FCC, A View on Today's Most Pressing Wireless Issues, Remarks at Fifth Annual Conf. on Spectrum Mgmt., Law Seminars Int'l, Arlington, VA (Sept. 18, 2008), *available at* www.fcc.gov/commissioners/adelstein/speeches2008.html 12

H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 1 (1996) 10

Kathleen Q. Abernathy, Comm'r, FCC, The Nascent Servs. Doctrine, Remarks at Fed. Comms. Bar Ass'n N.Y. Chapter (Jul. 11, 2002), *available at* www.fcc.gov/Speeches/Abernathy/2002/spkqa217.html 12-13

STATEMENT OF INTEREST[1]

As more fully set forth in the Argument section below, *Amici Curiae* NextG Networks of California, Inc. ("NextG") and The DAS Forum[2] (jointly "DAS *Amici*") deploy and/or use distributed antenna system ("DAS") networks to provide telecommunications services. DAS *Amici* have a strong interest in this proceeding because the en banc decision of the Ninth Circuit in *Sprint Telephony PCS, LP v. San Diego County*, 543 F.3d 571 (9th Cir. 2008), and in particular the Ninth Circuit's interpretation of 47 U.S.C. § 253 will affect the ability of DAS *Amici* to deploy and provide telecommunications services. Indeed, NextG and other members of The DAS Forum are involved in current

---

[1] Pursuant to Rule 37 of the Court's Rules, Counsel of record for all parties received notice at least 10 days prior to the due date of *amici curiae's* intention to file this brief. All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] The DAS Forum, a membership section of PCIA-The Wireless Infrastructure Association, is a non-profit trade association that acts as a neutral forum dedicated to advancing, developing and shaping the future of distributed antenna systems ("DAS") as a viable component of the nation's wireless telecommunications network, to foster a free and open exchange of information and ideas through broad stakeholder participation, to advocate for responsible public policy decisions, to promote the adoption of interoperable technologies, and to engage in any lawful act or activity in furtherance thereof.

litigation, including in courts in the Ninth Circuit, that may be affected by the Ninth Circuit's decision and thus by the outcome of the Court's resolution of Sprint's Petition for a writ of *certiorari*.

SUMMARY OF ARGUMENT

With the Telecommunications Act of 1996 ("TCA"), Congress enacted sweeping changes to the regulatory and competitive landscape of the telecommunications industry. As stated in the title of the TCA, Congress sought "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, 110 Stat. 56 (1996). A cornerstone of the TCA and a key to accomplishing Congress' goal was Section 253, 47 U.S.C. § 253. Entitled "Removal Of Barriers To Entry," Section 253(a) declares that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit *or have the effect of prohibiting* the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a) (emphasis added).

In *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), *cert. denied*, 534 U.S. 1079 (2002), the Ninth Circuit had accurately and faithfully applied the text of Section 253 and the intent of Congress to identify the elements of local legal requirements that are preempted by Section 253(a). While not eliminating all subsequent municipal barriers, the Ninth Circuit's *Auburn* standards played an important role in facilitating the

ability of companies to deploy telecommunications networks and services.

Amici Curiae NextG Networks of California, Inc. and The DAS Forum support Sprint's Petition For Certiorari because the Ninth Circuit's en banc decision in this case, reversing *Auburn*, presents an important case of national interest. The Ninth Circuit's narrow reading of Section 253(a) in this case is directly contrary to the intent of Congress, the policy goals of the Federal Communications Commission ("FCC"), and the interpretation of Section 253 by the FCC and several other Circuit Courts. If uncorrected, the Ninth Circuit's en banc decision likely will embolden local governments to erect regulatory regimes so Byzantine as to have the effect of thwarting the deployment of advanced telecommunications technologies and competitive telecommunications services. While unacceptable in any context, the costs, burdens, delays, and uncertainty imposed by such municipal requirements will be particularly detrimental to the ability of new entrants, such as NextG and other DAS Forum members, to enter the market. Moreover, the Ninth Circuit's decision will have a detrimental impact beyond Sprint and purely wireless providers, as it undermines what had been well established principles regarding deployment of telecommunications services in public rights-of-way.

Accordingly, for the reasons identified by Sprint in its Petition and as set forth below, the Petition should be granted.

ARGUMENT IN SUPPORT OF GRANTING THE PETITION

I. BACKGROUND ON NEXTG, THE DAS FORUM, AND DISTRIBUTED ANTENNA SYSTEMS ("DAS")

As wireless telecommunications providers deploy the next generation of wireless services, one of the central obstacles they face is the need for greater capacity (the number of people who can be served at a time) and bandwidth (the ability to carry content-intensive communications, such as e-mail attachments or Internet access). While they may not all be licensed wireless carriers, DAS *Amici* use Distributed Antenna System ("DAS") networks to provide an innovative new technology and telecommunications service that effectively increases wireless network capacity to accommodate data and advanced services.[3]

NextG and several of its competitors and co-members of The DAS Forum are technology-driven start-up companies that provide telecommunications

---

[3] For example, NextG is not a wireless carrier but, rather, has been issued necessary certificates of public convenience and necessity by several state regulatory agencies to operate as a competitive telecommunications carrier in those states, to the extent required by those agencies' regulations. *E.g.*, *In re NextG Networks of Cal., Inc.*, CPUC Decision 03-01-061, 2003 WL 288990 (Cal. P.U.C. January 30, 2003); *modified*, CPUC Decision D.07-04-045 at 12 (Cal. P.U.C. 2007). Most independent DAS providers, such as NextG, are "carriers' carriers" who provide service to wireless carriers that in turn provide retail service to end users.

services via DAS networks that they construct on utility infrastructure (e.g., utility and streetlight poles) located in public rights-of-way and utility easements. A DAS network is, basically, a series of small antennas located on utility or street light poles in public rights-of-way or utility easements that are interconnected by fiber optic lines. Where a traditional "macro" wireless cell site such as a tower or monopole typically has a full complement of electronic network equipment located at the site with the antenna, the DAS network splits that traditional cell by placing the electronic network equipment at a central "hub" location and routing the signals to and from the remote antenna "nodes" via the fiber optic lines.

These DAS networks facilitate a greater re-use of the wireless spectrum, since the antennas define small radio coverage cells isolated from each other, each carrying the same capacity and quality as a network delivered by traditional means. In addition, a DAS network in an urban area can provide coverage in many areas or "dead spots" that may be "shadowed" from coverage by the traditional antenna locations. Higher capacity and greater coverage in turn are the necessary building blocks for new, content-intensive wireless telecommunications services that are in demand by consumers. DAS networks also take advantage of existing rights-of-way infrastructure, in the same way as traditional, purely wireline telephone systems.

II. THE COURT'S INTERPRETATION OF SECTION 253 IS IMPORTANT AND WILL HAVE WIDE IMPACT

While technologically innovative and pro-competitive, DAS deployments are subject to far too many local regulatory hurdles precisely like those at issue in this case. Indeed, entry into the telecommunications market by DAS *Amici* and similar new entrants is too often threatened by local governments who want to decide for themselves whether, when, and on what terms such providers may deploy technology and enter the telecommunications market.

The Ninth Circuit's en banc decision in this case reversed nearly a decade's worth of established case law and, in so doing, threatens the ability of telecommunications providers, particularly new entrants such as NextG and other members of The DAS Forum, to deploy their advanced technologies and new services.

The clear and specific standards set forth by the Ninth Circuit in *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), *cert. denied*, 534 U.S. 1079 (2002), and subsequent decisions were an important tool, preventing unnecessary disputes and facilitating deployment in many communities. However, even with the clear standards of *Auburn*, NextG, members of The DAS Forum, and other telecommunications industry participants too often faced municipal requirements and actions that severely delayed or effectively denied their ability to provide service. Indeed, NextG and other DAS Forum members have on numerous occasions had to

bring actions to protect their rights under Section 253 of the Communications Act, 47 U.S.C. § 253. *See, e.g., NextG Networks of NY, Inc. v. City of New York,* S.D.N.Y., Case No. 03 Civil 9672 RMB; *NextG Networks of Cal., Inc. v. City of Huntington Beach,* C.D. Cal., Case No. SACV 07-1471 ABC; *NextG Networks of Cal., Inc. v. County of Los Angeles,* 522 F. Supp.2d 1240 (C.D. Cal. 2007); *NextG Networks of Cal., Inc. v. City of Carlsbad,* S.D. Cal., Case No. 06 CV 0650 JAH; *NextG Networks of NY, Inc. v. City of Lynn, et al.,* D. Mass., Case No. 08-11020 LTS; *NextG Networks of Cal., Inc. v. City and County of San Francisco,* Case No. C 05 0658 MHP, 2006 U.S. Dist. LEXIS 36101 (N.D. Cal. June 2, 2006); *NextG Networks of NY, Inc. v. City of Everett,* D. Mass., Case No. 08 11020 NGY; *Newpath Networks, LLC v. City of Irvine,* 2008 WL 2199689 (C.D. Cal. Mar. 10, 2008); *Extenet Systems, Inc. v. City and County of San Francisco,* N.D. Cal., Case No. C 06 06536 MHP.

By reversing *Auburn*, the Ninth Circuit's en banc *Sprint* decision is likely to make entry by DAS *Amici* and others even more difficult. Emboldened by what they perceive as a standard granting cities the ability to impose any requirement and take any action so long as it does not lead to a specific construction permit denial, cities have and will expand their regulatory impositions, particularly on networks that include any "wireless" element. In turn, this expansion of regulatory obstacles to deployment will impede the development of networks to meet consumers' telecommunications demands.

An example is NextG's ongoing litigation with the City of Huntington Beach, California. Under Huntington

Beach's challenged code, NextG is required to obtain all of the following: a franchise (and pay unstated franchise fees), notwithstanding that such a franchise requirement is expressly forbidden under state law; a Wireless Permit; a Conditional Use Permit; Design Review approval; and Encroachment Permits. City Of Huntington Beach, Cal., Municipal Code § 230.96 (available at http://www.surfcity-hb.org/files/users/city_clerk/Chp230.pdf). NextG has estimated that applying for the Wireless Permit will cost approximately $200,000 for a system involving 15 "Nodes" and associated fiber optic lines. Yet, only the Encroachment Permit requirement is imposed on other users of the public rights-of-way (e.g., electric utilities, incumbent telephone, and cable operators), despite that the other, existing facilities are more extensive and frequently larger than NextG's and that NextG competes with incumbent telephone companies and cable television operators. Despite the clear barrier to entry imposed by the City's requirements, in the wake of the en banc decision in *Sprint*, Huntington Beach filed a motion for judgment on the pleadings, arguing that NextG's Section 253 claims must be dismissed on the theory that, under *Sprint*, NextG cannot state a Section 253 claim unless and until it applies for permits and they are denied after the entire process has run its course, no matter that the burden, expense, delay, and uncertainty may have materially inhibited or limited NextG's ability to provide service even before or absent a complete denial. *NextG Networks of Cal., Inc. v. City of Huntington Beach*, Case No. SACV 07-1471 ABC (C.D. Cal.), Docket Entry # 64 at 11-12.

Other DAS Forum members, likewise, have current litigation in the Ninth Circuit and current network deployment plans that may be affected adversely by the *Sprint* decision if not reversed. *See, e.g.*, *Extenet Sys., Inc. v. City and County of San Francisco*, N.D. Cal., Case No. C 06 06536 MHP. Because DAS *Amici* face the prospect of literally hundreds if not thousands of municipal entry requirements, they have a critical interest in the Court granting Sprint's Petition and reversing the en banc decision in *Sprint*.

Until the Ninth Circuit's change in course, Section 253 had been an important and meaningful tool advancing Congressional intent. Absent review and reversal by this Court, the Ninth Circuit's new approach will significantly threaten, if not thwart outright, the continued deployment of new, advanced technologies and services such as DAS networks. Accordingly, the Court should grant Sprint's Petition and reverse the en banc decision.

III. THE NINTH CIRCUIT EN BANC DECISION, IF NOT OVERTURNED, WILL HAVE SIGNIFICANT ADVERSE EFFECTS ON DEPLOYMENT OF NEW TECHNOLOGIES AND COMPETITIVE SERVICES

A. The Intent Of Congress In Enacting The Telecommunications Act Of 1996 Was To Promote Deployment Of Advanced Technologies And Competitive Services

The primary purpose of the Telecommunications Act of 1996 ("TCA"), Pub. L. No. 104-104, 110 Stat. 56 (1996), which amended the Communications Act of 1934, was to "accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition. . . ." H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 1 (1996) (the "Conference Committee Report"). The Conference Committee Report also noted that the purpose of the statute is to provide for a "pro-competitive, de-regulatory national policy framework." *Id.* When Congress passed the TCA, it expressed its intent "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, 110 Stat. 56 (1996).

Indeed, Congress made clear in 47 U.S.C. §157(a) that

> [i]t shall be the policy of the United States to encourage the provision of new technologies and services to the public. Any person or party (other than the [FCC]) who opposes a new technology or service proposed to be permitted under this Act shall have the burden to demonstrate that such proposal is inconsistent with the public interest.

47 U.S.C. § 157(a). In addition, in Section 706 of the TCA (codified at 47 U.S.C. § 157 nt), Congress directed the Federal Communications Commission ("FCC") to "encourage the deployment . . . of advanced telecommunications capability to all Americans . . . by utilizing . . . measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." Pub. L. No. 104-104, § 706(a), 110 Stat. 153 (1996) (reproduced in the notes under 47 U.S.C. § 157). Section 706(b) directs the FCC to undertake regular inquiries into the availability of advanced telecommunications capabilities, and if the FCC finds that advanced telecommunications capabilities are not being deployed to all Americans, Section 706(b) requires the FCC to "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." Pub. L. No. 104-104, § 706(b), 110 Stat. 153 (1996) (reproduced in the notes under 47 U.S.C. § 157).

As a result of these clear statements of Congressional intent, the policy of promoting competition and new technologies has been at the forefront of communications policy since the TCA was enacted. Promoting deployment of facilities-based competition, and in particular the deployment of advanced technologies, has been the primary focus of the FCC's policies. *See, e.g.*, Jonathan S. Adelstein, Comm'r, FCC, A View on Today's Most Pressing Wireless Issues, Remarks at Fifth Annual Conf. on Spectrum Mgmt., Law Seminars Int'l, Arlington, VA (Sept. 18, 2008), *available at* www.fcc.gov/commissioners/adelstein/speeches2008.html (noting that it is the FCC's mission to "encourage[] the development and availability of innovative tools and services"); *In re Inquiry Concerning the Deployment of Adv. Telecomms. Capability to all Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to the Telecomms. Act of 1996*, Fifth Report, 23 F.C.C.R. 96615, ¶ 76 (Jun. 12, 2008) ("The Commission's broadband policy is to continue to promote investment in multiple broadband platforms, to promote greater speeds, and to promote related digital technologies and services that will encourage broadband demand."); *In re CommNet Commc'ns Network, Inc.*, Order, DA 07-2032, 2007 FCC LEXIS 3746 ¶ 13 (FCC May 9, 2007) (purpose of wireless spectrum auction rules is "the rapid deployment of new technologies and services to the public"); *E911 Requirements For IP-Enabled Serv. Providers*, 20 F.C.C.R. 10245, at 10333 (Jun. 03, 2005) (separate statement of Comm'r Jonathan S. Adelstein) ("we must continue to promote the deployment of new technologies"); Kathleen Q. Abernathy, Comm'r, FCC,

The Nascent Servs. Doctrine, Remarks at Fed. Comms. Bar Ass'n N.Y. Chapter (Jul. 11, 2002), *available at* www.fcc.gov/Speeches/Abernathy/2002/spkqa217.html (**promoting regulatory** restraint to "facilitate the development of new products and services without the burden of anachronistic regulations, and in turn promote the goal of enhancing facilities-based competition").

Promoting deployment was not left exclusively to the FCC. To effectuate its policy goals, Congress enacted Section 253(a), which provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit *or have the effect of prohibiting* the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a) (emphasis added). In so doing, Congress gave due consideration to the potential conflict between state and local government regulation and the national need for deployment of advanced telecommunications and information technologies. In Section 253(a), Congress stated a broad general rule preempting local and state entry barriers. To retain some state and local regulatory involvement, Congress reserved in Section 253(b) and Section 253(c) specific areas for local oversight. In Section 253(b), Congress reserved only to states the authority to adopt "requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." 47 U.S.C. § 253(b). In Section 253(c), Congress reserved to states and local authorities the power to "manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a

competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis. . . ." 47 U.S.C. § 253(c).

This statutory structure has been recognized to provide a broad preemption of local requirements and a narrow reservation of authority to municipalities. *See, e.g., TCI Cablevision of Oakland County, Inc.*, 12 F.C.C.R. 21396, ¶¶ 103-109 (1997); *Auburn*, 260 F.3d at 1170. Indeed, such a reading of Section 253 is necessary and appropriate to give effect to the goals and policies of Congress in the TCA.

As discussed below, the Ninth Circuit's new interpretation of Section 253 contradicts the intent of Congress and threatens to undermine the policies and actions of the FCC. Accordingly, Sprint's Petition should be granted and the en banc decision in *Sprint* reversed.

B. The Ninth Circuit's New Decision Interprets Section 253 In Conflict With The Language And Intent Of Congress

The Ninth Circuit's en banc decision in *Sprint* purports to correct a perceived grammatical mistake by the Ninth Circuit panel in *Auburn*, but in so doing, the en banc Ninth Circuit went too far. *Sprint*, 543 F.3d at 578. Regardless of whether the *Auburn* court was mistaken in quoting Section 253(a) to say that a local requirement is preempted if it "may . . . have the effect of prohibiting" the ability of a company to provide telecommunications services, the *Auburn* court's interpretation of Section 253(a) and application of it to the facts in that case were absolutely correct when

viewed in light of the language of Section 253 as a whole and the intent of Congress. The Court should grant Sprint's Petition because, in its zeal to remedy a perceived error in grammar, the en banc decision in *Sprint* goes too far, ignoring the intention of Congress and the plain language and structure of Section 253, and the result will have a profound impact on the deployment of advanced telecommunications technologies and services.

1. The Ninth Circuit's En Banc Interpretation Of Section 253 Ignores Well-Established FCC And Court Precedent, As Well As The Intent Of Congress In Enacting The TCA

In *Auburn*, the Ninth Circuit explained that the preemptive language of Section 253 is

> virtually absolute and its purpose is clear – certain aspects of telecommunications regulation are uniquely the province of the federal government and Congress has narrowly circumscribed the role of state and local governments in this arena. *Municipalities therefore have a very limited and proscribed role in the regulation of telecommunications.*

260 F.3d at 1175 (emphasis added) (internal citations omitted). Recognizing the pro-competitive, pro-deployment intent of Congress, discussed *supra*, the *Auburn* court correctly interpreted Section 253 to preempt the local ordinances at issue because, as a

whole, the burdensome application process and substantive requirements had "the effect of prohibiting" the provision of telecommunications services and created "a substantial and unlawful barrier to entry into and participation in the Counterclaim Cities' telecommunications markets." *Id.* at 1176.

The en banc panel in *Sprint* takes issue with the *Auburn* court's use of an ellipsis in paraphrasing Section 253 – in particular its statement that Section 253(a) preempts "regulations that not only 'prohibit' outright the ability of any entity to provide telecommunications services, but also those that 'may . . . have the effect of prohibiting' the provision of such services." *Sprint*, 543 F.3d at 578. Yet, setting aside the merits of the *Auburn* quotation, the substantive result in *Auburn* was correct and has been reached even without the "may" language being quoted as the court did in *Auburn*. *See, e.g.*, *RT Commc'ns, Inc. v. Fed. Commc'ns Comm'n*, 201 F.3d 1264, 1268 (10th Cir. 2000) (holding that "the extent to which the statute is a 'complete' bar is irrelevant. § 253(a) forbids any statute which prohibits or has 'the effect of prohibiting' entry. Nowhere does the statute require that a bar to entry be insurmountable before the FCC must preempt it."); *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006) ("[A] prohibition does not need to be complete or 'insurmountable' to run afoul of § 253.") (quoting *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002), *cert. denied.*, 538 U.S. 923 (2003)).

For example, the Second Circuit in *TCG New York, Inc. v. City of White Plains* reached the same conclusion

and applied Section 253 to preempt the local ordinance at issue in that case based on the burden it imposed and the discretion contained therein without resorting to the "may" grammatical quotation of *Auburn*. 305 F. 3d at 76. In *White Plains*, the Second Circuit held that the challenged ordinance and franchise in that case violated Section 253(a) based on the face of the requirements, as a whole, but recognized that "the provision that gives the Common Council the right to reject any application based on any 'public interest factors . . . that are deemed pertinent by the City' amounts to a right to prohibit providing telecommunications services, albeit one that can be waived by the City." *Id.* The Second Circuit correctly based its ruling not only on the precedent set by other courts, *id.* ("Courts have held that a prohibition does not need to be complete or 'insurmountable' to run afoul of § 253(a)") (citations omitted), but also that of the FCC – the very federal agency that is charged with effectuating the purpose of the TCA. As the Second Circuit explained:

> The FCC has stated that, in determining whether an ordinance has the effect of prohibiting the provision of telecommunications services, it "consider[s] whether the ordinance materially *inhibits or limits* the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."

Id. (emphasis added) (quoting *In re Cal. Payphone Ass'n*, 12 F.C.C.R. 14191, 1997 WL 400726, at 31 (1997)).

As Sprint explains in its Petition, the statutory text and the intent of Congress support the interpretation that Section 253(a) does *not* preempt only complete prohibitions or outright denials. (Sprint Petition at 17-18). Indeed, as this Court recognized,

> the practical implication of that interpretation is to read out of § 253 the words 'or ha[s] the effect of prohibiting,' by which Congress signaled its willingness to preempt laws that produce the unwanted effect, *even if they do not advertise their prohibitory agenda on their faces. . . . [T]here is no justification for preempting only those laws that self-consciously interfere with the delivery of telecommunications services.*

Nixon v. Missouri Mun. League, 541 U.S. 125, 139-40 (2004) (emphasis added).

As demonstrated in Part III.A., *supra*, Congress could not have been more clear that the fundamental and overriding purpose of the TCA was to eliminate impediments to deployment and market entry. To the extent that it is read to mean that Section 253(a) only preempts local requirements that create a complete ban on or outright denial of the provision of service, the Ninth Circuit's new decision completely ignores Congress' intent in enacting the TCA, and instead goes too far in attempting to fix a perceived grammatical problem in the *Auburn* court's interpretation of Section 253.

C. The Ninth Circuit's Decision Will Deter The Deployment Of New Technologies And Competitive Services

It is important for the Court to grant the Petition because, if the Ninth Circuit's interpretation of Section 253 means that it is essentially only a remedy to be pursued *after* an outright denial of an application for the provision of new services, it may bankrupt new entrants or deter new entrants from even attempting to enter the market. Surely, this is not the outcome intended by Congress in enacting the TCA.

The deployment of new technologies and competitive services requires a significant capital investment – potentially millions of dollars for each community. Simply to undertake the design stage of a DAS network requires significant expense and investment. Uncertainty resulting from wholly subjective, discretionary local requirements creates so much risk that new entrants may not even undertake the investment involved in planning for new services. Moreover, the expense of complying with local application and information requirements may alone be prohibitive of new entrants to the market. And delays of a year or more, coupled with the uncertainty of whether the network will be built at all in the end, will deter or prevent investment in new technologies and competitive services.

New entrants are particularly negatively affected by delay and uncertainty. This is not to say that delay and uncertainty are acceptable for established companies – clearly they are not – but for a new entrant,

such as NextG and other DAS *Amici*, the ability to deploy promptly and begin achieving revenues could be the difference between financial survival and failure. Having to navigate the multiple layers and multiple years of delay and uncertainty imposed by ordinances, such as San Diego County's, before even achieving standing to challenge the requirements could be devastating to deployment and innovation by new entrants. New market entrants in particular cannot afford to spend months or years and tens or hundreds of thousands of dollars to pursue an access application just to develop a record that would then require many more months or years and hundreds of thousands of dollars to litigate. That interpretation itself would thwart Congress' policy goal of prompt deployment of competitive services and new technologies. Instead, Section 253 must be able to eliminate local overreaching proactively to provide certainty and speed to market.

Without the limitation of *Auburn*, cities will continue to impose burdensome, delaying, overreaching requirements that will have the effect of prohibiting the deployment of advanced technologies and services. As Sprint has pointed out, various cities are already moving to impose burdensome ordinances similar to the County of San Diego's in light of the Ninth Circuit's decision. (Sprint Petition at 23). Additionally, as previously stated, Huntington Beach recently filed a motion for judgment on the pleadings, arguing that NextG's Section 253 claims must be dismissed on the theory that, under *Sprint*, NextG cannot state a Section 253 claim unless and until it applies for multiple permits and they are denied. Motion for Judgment on the

Pleadings, filed Dec. 29, 2008 in *NextG Networks of Cal., Inc. v. City of Huntington Beach*, C.D. Cal., Case No. SACV 07-1471 ABC, Docket Entry # 64 at 11-12.

The Court should grant Sprint's Petition to address these important issues.

D. The Court's Review Is Needed To Provide Clarity Regarding The Rights Of Wireline Providers Using The Public Rights-Of-Way

A critical point that may be lost in this case, where the plaintiff is a provider of wireless telecommunications services, is the importance of Section 253 for telecommunications providers such as DAS providers who deploy in the public rights-of-way. Section 253(a)'s preemption of local government regulations clearly applies to all telecommunications service providers, regardless of the technology used. Nonetheless, it appears that because Sprint provides wireless telecommunications services the Ninth Circuit lost sight of well established principles regarding municipal authority over telecommunications services, particularly in the context of public rights-of-way deployment. The Court should grant Sprint's Petition because the Ninth Circuit's decision, if not addressed, may also adversely affect telecommunications companies beyond Sprint or purely wireless providers.

The public right-of-way is already dedicated to telecommunications and utility uses. For over a century, telephone companies have placed their lines on utility poles and in underground conduits in the public rights-of-way, along with electric utilities, cable operators,

sewer, gas, and other such facilities-based providers. In some states, such as California, telecommunications providers are granted explicit, state-wide franchises authorizing them to deploy their facilities in the public rights-of-way. *See, e.g.*, Cal. Pub. Util. Code § 7901. Likewise, in Section 253(c), Congress recognized that telecommunications networks require access to public rights-of-way. 47 U.S.C. § 253(c).

In crafting the balance between its overriding goal of national telecommunications deployment and local government authority, Congress preserved only local "competitively neutral and nondiscriminatory" "manage[ment]" of the public rights-of-way. 47 U.S.C. § 253(c); *TCI Cablevision of Oakland County*, 12 F.C.C.R. 21396 at ¶ 109; *White Plains*, 305 F.3d at 79. Such "management" of the public rights-of-way has been recognized to mean oversight of construction issues, such as bonding, insurance, and safety regulations – not regulation of services or companies. *See, e.g., TCI Cablevision of Oakland County*, 12 F.C.C.R. 21396 at ¶ 103; *see also White Plains*, 305 F.3d at 81 (recognizing that Section 253 only permits regulation of the use of the rights-of-way not telecommunications service); *AT&T Commc'ns of Southwest, Inc. v. City of Dallas*, 8 F. Supp. 2d 582, 591 (N.D. Tex. 1998), *vacated on other grounds*, 243 F. 3d 928 (5th Cir. 2001) (same). Congress did not provide for municipalities to exclude providers based on subjective evaluations of whether their facilities might be less intrusive elsewhere or whether the provider's service coverage was already sufficient.

Yet, many of the municipal ordinances faced by DAS *Amici* and others do not legitimately manage right-of-way access (or even purport to) since they are imposed solely on the grounds that particular equipment is used in connection with the provision of wireless service. Like San Diego County's Wireless Telecommunications Ordinance and the ordinance in Huntington Beach, municipalities are imposing regulatory regimes based solely on the fact that the networks include a radio frequency element, even when the networks are deployed with existing utility facilities in the public rights-of-way and primarily consist of fiber optic lines. The cities do not impose the same type of regulatory burden on purely wireline telecommunications or utility facilities occupying the same public rights-of-way, even though those other facilities are frequently much larger and more visually intrusive than the wireless elements of a wireless network, thereby creating greater safety and aesthetic concerns in the public right-of-way.

By focusing their discretionary, burdensome requirements only on "wireless" equipment, localities are essentially seeking to control market entry for and regulate an entire segment of telecommunications market competitors. Such discriminatory scrutiny is unwarranted and clearly in conflict with the pro-deployment, pro-competitive policies of Congress and the FCC.

Indeed, by imposing only on one set of competitors a regulatory regime that vastly increases cost and time to market, such requirements patently have the effect of prohibiting the ability to provide telecommunications services by materially limiting or inhibiting the

companies' ability to compete on a fair and balanced legal and regulatory basis. *See, e.g.*, *White Plains*, 305 F.3d at 76; *In re State of Minnesota*, 14 F.C.C.R. 21697, ¶¶ 20-49 (1999) (holding that imposing added costs and increased time to market on new entrants violates Section 253); *In re Public Util. Comm'n of Texas*, 13 F.C.C.R. 3460, ¶ 82 (1997) (holding that "by imposing the costs of providing facilities based service only on [certain carriers], the build-out provisions significantly affect[ed] the ability of [these carriers] to compete against other certificated carriers for customers in the local exchange market"). Yet, according to at least some cities, the Ninth Circuit's en banc decision in this case deprives aggrieved telecommunications providers such as DAS *Amici* a reasonable opportunity to challenge burdensome and discriminatory local regulations. Requiring a telecommunications provider to navigate a laborious, improper application processes to receive a final, negative determination before challenging the improper, federally preempted regulations is counterproductive and contradicts Congressional intent that barriers to providing telecommunications services be removed.

In *Auburn*, the Ninth Circuit correctly identified the "very limited and proscribed role" of municipalities with regard to telecommunications deployment, particularly in the public rights-of-way. 260 F.3d at 1175 (quoting *City of Dallas*, 8 F. Supp. 2d at 591). The *Sprint* decision appears to reject the court's prior, correct interpretation of municipal authority. As a result, at a minimum it creates uncertainty and confusion that will have the effect of deterring investment in and

deployment of new technologies and competitive services. Accordingly, the Court should grant Sprint's Petition.

CONCLUSION

The Ninth Circuit's decision is contrary to the dominant interpretation of Section 253(a) and the only interpretation that would give meaning to the statute and effectuate the intent of Congress. For NextG and other DAS Forum members, fidelity to the purpose of the TCA's broad preemption is vital, as the Ninth Circuit's interpretation could have significant adverse consequences for these telecommunications service providers and the millions of customers they serve. DAS *Amici* therefore urge the Court to grant Sprint's petition for a writ of certiorari.

Respectfully submitted,

T. Scott Thompson
Counsel of Record
Leslie Moylan
Davis Wright Tremaine, LLP
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20006
(202) 973-4200

Attorneys for Amici Curiae

117 (3)

No. 08-759

Supreme Court, U.S.
FILED
JAN 12 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SPRINT TELEPHONY PCS, L.P.,

Petitioner,

v.

COUNTY OF SAN DIEGO, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* OF PCIA – THE WIRELESS INFRASTRUCTURE ASSOCIATION, THE CALIFORNIA WIRELESS ASSOCIATION, AND NEWPATH NETWORKS, LLC, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JACQUELINE MCCARTHY
Director of Government Affairs
MICHAEL D. SAPERSTEIN, JR.
Public Policy Analyst PCIA – The Wireless Infrastructure Association
901 N. Washington St.
Suite 600
Alexandria, VA 22314

ROBERT JYSTAD
Counsel of Record
JULIAN K. QUATTLEBAUM, III
MARTHA HUDAK
CHANNEL LAW GROUP, LLP
100 Oceangate, Suite 1400
Long Beach, CA 90802
(310) 209-8515

Counsel for Amici Curiae

220446

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	ii
INTERESTS OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	4
ARGUMENT	6
A. The Split of Authority over a Critical Issue in Federal Telecommunications Law Warrants Review	6
B. The Case Warrants Review Because the Federal Telecommunications Policies Impacted by *Sprint II* Are of Paramount Concern to the Country	8
C. The Court Also Should Hear This Case Because It Raises Important Issues of Federalism	18
D. The Court Needs To Clarify the Application of *United States v. Salerno*	20
E. *Sprint II* Would Foster Anti-Competitive Actions Contrary to the TCA's Goals	23
CONCLUSION	24

TABLE OF CITED AUTHORITIES

Page

Cases

American Tower Corp. v. City of San Diego, Case No. 07cv0399 (S.D. Cal., filed as amended Aug. 29, 2007) 17

Cablevision of Boston, Inc. v. Pub. Improvement Comm'n, 184 F.3d 88 (1st. Cir. 1999) 10

City of Auburn v. Qwest Corp., 260 F.3d 1160 (9th Cir. 2001) 2, 7, 11, 19

City of Chicago v. Morales, 527 U.S. 41 (1999) .. 20, 21, 22

City of Ladue v. Gilleo, 512 U.S. 43 (1994) 21

City of Rancho Palos Verdes v. Abrams, 544 U.S. 113 (2005) 12, 14, 18, 19

Core Commc'ns, Inc. v. Verizon Pa., Inc., 493 F.3d 333 (3d Cir. 2007) 12, 18

Ill. Bell Tel. Co. v. Vill. of Itasca, 503 F. Supp.2d 928 (N.D. Ill. 2007) 7

In re Cal. Payphone Ass'n, 12 F.C.C.R 14191 (1997) 23

Cited Authorities

	Page
Level 3 Commc'ns, Inc. v. City of St. Louis, 477 F.3d 528 (8th Cir. 2007)	6, 7
MetroPCS, Inc. v. City & County of San Francisco, 400 F.3d 715 (9th Cir. 2005)	14
NewPath Networks, LLC v. City of Irvine, App. Case Nos. 08-55755 & 08-56010 (9th Cir. appeal filed June 5, 2008)	4, 16
NextG Networks of Cal., Inc. v. County of Los Angeles, 522 F. Supp.2d 1240 (C.D. Cal. 2007)	16
Nixon v. Mo. Mun. League, 541 U.S. 125 (2004)	20
N.J. Payphone Ass'n, Inc. v. Town of West New York, 299 F.3d 235 (3d Cir. 2002)	7
Petersburg Cellular Pshp. v. Board of Supervisors, 205 F.3d 688 (4th Cir. 2000)	10
Puerto Rico Tel. Co. v. Municipality of Guayanilla, 450 F.3d 9 (1st Cir. 2006)	6
Puerto Rico Tel. Co. v. Telecomms. Regulatory Bd., 189 F.3d 1 (1st Cir. 1999)	11, 12

Cited Authorities

Page

Qwest Corp. v. City of Santa Fe, 380 F.3d 1258 (10th Cir. 2004) 6

Sprint Telephony PCS, L.P. v. County of San Diego, 490 F.3d 700 (9th Cir. 2007), *reversed en banc*, 543 F.3d 571 (9th Cir. 2008) ..... *passim*

TCG New York, Inc. v. City of White Plains, 305 F.3d 67 (2d Cir. 2002) 6

In re TCI Cablevision of Oakland County, Inc., 12 F.C.C.R. 21396 (Sept. 19, 1997) 6, 13, 18

United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974) 6

United States v. Salerno, 481 U.S. 739 (1987) .. 20, 21, 22

Statutes and Ordinances:

Telecommunications Act of 1996, 110 Stat. 56, Pub. L. No. 104-104, Preamble, 110 Stat. 56 ..... *passim*

47 U.S.C. § 251 18

47 U.S.C. § 252 18

47 U.S.C. § 253 ..... *passim*

Cited Authorities

Page

47 U.S.C. § 253(a) 11, 19, 20, 23

47 U.S.C. § 253(b) 19

47 U.S.C. § 253(c) 19

Miscellaneous:

"Accelerated Wireless Broadband Infrastructure Deployment: Impact on GDP and Employment 2009-2010" (Pearce & Pagano, Dec. 24, 2008) 8, 9

Deone L. Brunning, "The Telecommunications Act of 1996: The Challenge of Competition," 30 CREIGHTON L. REV. 1255 (1997) 11

H.R. Rep. No. 104-204 (1996) 10

H.R. Conf. Rep. No. 104-458 (1996) 12

In re Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Radio Services, *Twelfth Report*, WT Dkt. No. 07-71, 23 F.C.C.R. 2241 (Feb. 4, 2008) 24

Marguerite Reardon, "Will Unlocked Cellphones Free Consumers?" *www.USAToday.com*, Jan. 24, 2007 24

Cited Authorities

Page

Report to City Council (City of Glendale) (Jan. 7, 2009) 15

Request for Council Action (City of Irvine) (Sep. 9, 2008) 16

Richard H. Fallon, Jr., "Commentary: As-Applied and Facial Challenges and Third-Party Standing," 113 HARV. L. REV. 1321 (2000) 22

Stephen Blumberg, Ph.D., and Julian V. Luke, "Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, January – June 2007" (Division of Health Interview Statistics, National Center for Health Statistics, 2007) 24

INTERESTS OF *AMICI CURIAE*[1]

Amici curiae consist of businesses and associations in the wireless infrastructure industry tasked with navigating the nationwide patchwork of regulations that often present insurmountable hurdles to developing the networks for wireless services. *Amici* support Sprint's petition for a writ of certiorari seeking review of the Ninth Circuit's latest decision on Section 253 of the Telecommunications Act of 1996, 110 Stat. 56, Pub. L. No. 104-104 (1996) ("TCA"), enacted as 47 U.S.C. § 253. Because *amici's* own and member businesses can only proceed at the level and pace that local regulations allow, *amici* and their members are actually and immediately harmed by regulations that burden deployment to the point of prohibition, particularly when they cannot bring facial challenges to prohibitive regulations. Therefore, pursuant to Rule 37.2, *amici* respectfully submit this brief in support of the petition for certiorari filed by Sprint Telephony PCS, L.P.

Amicus curiae PCIA—The Wireless Infrastructure Association ("PCIA") is the national trade association representing the wireless infrastructure industry. *Amicus curiae* The California Wireless Association ("CalWA") is a non-profit state-level trade association loosely affiliated with PCIA and also representing the

---

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief. The parties have been given at least 10 days notice of amici's intention to file.

wireless infrastructure and wireless services industries. PCIA and CalWA's members develop, own, manage, and operate towers, rooftop wireless sites, and other facilities for the provision of all types of wireless services, including broadcasting and telecommunications services. Advocating for sensible deployment of wireless infrastructure, the two trade associations engage at the local level to counsel jurisdictions as they enact regulations on the siting of wireless infrastructure. A key function of this interaction is to educate localities on all of the public safety, economic and social benefits that wireless communications provide to their citizens. Accordingly, PCIA and CalWA advise jurisdictions to take these benefits into account and provide balanced regulations that protect the integrity of a community but also provide for the infrastructure that produces the full range of wireless services. Many of PCIA's members operate around the nation within the parameters of thousands of different jurisdictional regulations and are faced with inconsistent methods of challenging those regulations based upon their location in the United States.

CalWA and its members are directly impacted by the Ninth Circuit's decision in the instant case. Since the Ninth Circuit's first decision interpreting § 253, *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), *cert. denied*, 534 U.S. 1079, 122 S. Ct. 809, 151 L. Ed. 2d 694 (2002), infrastructure companies and wireless carriers have brought multiple challenges against jurisdictions throughout the Ninth Circuit. These challenges have assisted in controlling any tendencies jurisdictions might have in enacting ordinances that are even more burdensome than the

County of San Diego's wireless telecommunications ordinance ("County WTO"), the ordinance originally enjoined in this case. These challenges were uniformly successful and judges in several courts, including the Ninth Circuit itself, followed the Ninth Circuit's binding precedent. The court's latest decision, which has eviscerated the protections originally enacted in § 253, effectively eliminates the ability of CalWA's members to bring facial challenges to overly burdensome ordinances throughout California. It also creates a real possibility that opposition to wireless infrastructure will find a secure foothold in the enactment of unreasonable and discouraging local requirements.

Amicus curiae NewPath Networks, LLC, is a provider of a specialized low power wireless telecommunications infrastructure known as neutral host distributed antenna systems or DAS. DAS originated as a solution for providing wireless services in stadiums, convention centers and other large building complexes (in-building DAS) and in difficult to serve areas subject to natural impediments, such as canyon roads (outdoor DAS), the technology became valued for its small size and ability to provide the services of multiple wireless carriers using a single set of inconspicuously interconnected antenna nodes in, among others, areas where traditional cell sites may be infeasible, such as residential zones. The appeal of DAS in these areas is amplified by what is widely recognized as the rapidly growing replacement of traditional wireline telephony with wireless technologies.

NewPath has a direct interest in the outcome of this litigation and supports Petitioner Sprint Telephony PCS

in its petition for a writ of certiorari. NewPath has a case pending at the Ninth Circuit, *NewPath Networks, LLC v. City of Irvine*, App. Case Nos. 08-55755, 08-56010 (9th Cir., appeal filed June 5, 2008) ("NewPath v. Irvine"). NewPath, which contends that it is also protected under California public utility laws, succeeded in enjoining the City of Irvine's Wireless Communications Ordinance ("Irvine WCO") on grounds that the WCO was preempted under the Supremacy Clause by § 253. NewPath now faces the City's appeal of the District Court ruling, which was based in large measure on the original Ninth Circuit decision in *Sprint Telephony PCS, L.P. v. County of San Diego*, 490 F.3d 700, 715-716 (9th Cir. 2007) ("Sprint I"), *reversed en banc*, 543 F.3d 571 (9th Cir. 2008) ("Sprint II"). The outcome of that appeal, in all likelihood, will be directly related to the outcome of Sprint's efforts to have the Ninth Circuit's decision in *Sprint II* reversed or amended by this Court.

Moreover, NewPath's efforts in other jurisdictions, not only throughout the Ninth Circuit but across the country, will be substantially hampered by this Court's decision not to hear Sprint's appeal of the Ninth Circuit's reversal, which undid long-standing and widely recognized precedent upholding the viability of facial challenges to local zoning ordinances purporting to regulate the placement of wireless facilities.

SUMMARY OF ARGUMENT

This case involves the ability of local jurisdictions to adopt burdensome permitting requirements as a means of regulating entities seeking to deploy, maintain or upgrade wireless communications infrastructure.

This brief describes the real impacts that local regulation has on the deployment of wireless infrastructure and explains why the ability to bring facial challenges to local *ultra vires* actions, without being forced to wait months or years to compile adequate track record evidence, is critical to ensuring both the effectiveness of federal law and the realization of federal policy goals.

In particular, the split of authority among the federal circuits raises critical issues at the heart of federal telecommunication policies aimed at reducing regulation and promoting rapid deployment of advanced telecommunications services and the infrastructure necessary to sustain that effort. This split also threatens to undermine federal policies aimed at ensuring that local requirements governing deployment are rational and not based, directly or indirectly, on local regulation of radio frequency emissions. In the absence of a consistent and effective interpretation of the protections enacted in § 253, *amici*, which already face numerous local challenges to deployment, will see impediments mount and costs rise in a manner that will seriously undermine the use of new technologies and the ubiquitous provision of wireless services.

ARGUMENT

A. The Split of Authority over a Critical Issue in Federal Telecommunications Law Warrants Review

Amici agree with Petitioner Sprint Telephony PCS, L.P., that review is warranted in light of the split of authority among federal circuits. The Ninth Circuit's en banc decision in *Sprint II* directly conflicts with *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9 (1st Cir. 2006), *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67 (2nd Cir. 2002), and *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004). Furthermore, *Sprint II* and the Eighth Circuit's comparable decision in *Level 3 Commc'ns, Inc. v. City of St. Louis*, 477 F.3d 528 (8th Cir. 2007), form a wide gap between two disparate perspectives on the use of § 253 to facilitate the achievement of federal policy goals. As the Federal Communications Commission ("FCC") stated in 1997, shortly after the TCA was adopted: "Congress enacted section 253 to ensure that no state or local authority could erect legal barriers to entry to telecommunications markets that would frustrate the 1996 Act's explicit goal of opening local markets to competition." *In re TCI Cablevision of Oakland County, Inc.*, 12 F.C.C.R 21396, para. 7 (Sept. 19, 1997). Consistent with that articulation, the FCC has scrutinized local requirements under the lens of § 253 with the understanding that "clever men may easily conceal their motivations." *United States v. City of Black Jack*, 508 F.2d 1179, 1185 (8th Cir. 1974) (noting that, in the zoning context, policies that discriminate on the basis of race are easily veiled); *TCI*, 12 F.C.C.R at para. 8

(". . . we are concerned that Troy and other local governments may be creating an unnecessary 'third tier' of telecommunications regulation"). Three federal circuits view § 253 in this same sense as a substantive restriction on state and local permitting requirements that threaten to impede the rapid deployment of critical telecommunication technologies and infrastructure. Two federal circuits read § 253 as a narrowly construed, and uncommonly used, tool for preventing local jurisdictions from erecting absolute and obvious barriers to new market entrants. This latter interpretation virtually eliminates facial challenges to wireless regulations and facilitates an atmosphere of no-holds barred zoning regulation of wireless infrastructure.

The split of authority arises and will continue to arise, in no small part, as a result of the confusing language of § 253. *St. Louis*, 477 F.3d at 531 (citing *N.J. Payphone Ass'n, Inc. v. Town of West New York*, 299 F.3d 235, 240 (3d Cir. 2002) ("[t]he language and structure of section 253 has, to understate the matter, created a fair amount of confusion")). Thus, a district court in the Seventh Circuit, which circuit has yet to take a position on facial challenges to § 253, elected not to follow the Eighth Circuit's reasoning and, rather, cited the multiple extra-circuit decisions on which the Ninth Circuit had relied to support its analysis initially in *Auburn* and, thereafter, in *Sprint I. Ill. Bell Tel. Co. v. Vill. of Itasca*, 503 F. Supp. 2d 928, 940 (N.D. Ill. 2007)

> "The Ninth Circuit, after reviewing district court cases from Texas and New York and a Fifth Circuit decision, explained, 'Taken together, these cases persuasively indicate

> that a regulatory structure that allows a city to bar a telecommunications provider from operating in the city prohibit[s] or ha[s] the effect of prohibiting the company's ability to provide telecommunications services under [§ 253].'"

(internal quotes omitted). *Sprint II*, with its reversal of *Sprint I*, now purports to align the Ninth Circuit with the Eighth Circuit, but it does not resolve the split of authority in the circuits as a whole. Rather, it renders the split even more apparent.

B. The Case Warrants Review Because the Federal Telecommunications Policies Impacted by *Sprint II* Are of Paramount Concern to the Country

The House Commerce Committee in conjunction with President-Elect Barack Obama's Transition Team recently produced an analysis of the impacts of wireless broadband deployment on the nation's economy. "Accelerated Wireless Broadband Infrastructure Deployment: Impact on GDP and Employment 2009-2010" (Pearce & Pagano, December 24, 2008) ("Pearce Report"). The Pearce Report relied in part on data from PCIA concerning the economic benefits of regulatory relief from lengthy delays associated with onerous local permitting processes. It drew several important conclusions:

1. "[N]ew wireless broadband investments of $17.4 billion will, within 24 months . . ., increase Gross Domestic Product ("GDP") by 0.9% to 1.3%, which translates in dollar

terms to $126.3 billion to $184.1 billion, and will result in an increase of between 4.5 million and 6.3 million jobs." (Pearce Report at p. 3.)

2. "By investing in both wireless broadband access infrastructure, both jobs and income are increased, not only by the direct investment in building new wireless towers and modifying existing towers, thereby expanding network capacity, speed, and reliability, but also by the indirect benefits of filling coverage holes and providing broadband services to more of the U.S." *Id.*

The Pearce Report noted that its results were largely based on data from PCIA, which calculated that additional wireless investments of $11.5 billion would be available if regulatory relief were provided in the form of the pending CTIA "shot-clock petition" at the FCC. *Id.* at p. 9. In the same report, CTIA noted that removal of the regulatory bottleneck carriers now face "would result in a flood of shovel ready construction almost immediately." *Id.* at p. 3 (internal quotes omitted).

PCIA further estimates that costs associated with the zoning of new wireless facilities in difficult jurisdictions, not including renewal efforts, denial-related litigation or facial challenges to onerous requirements, amounts to roughly a billion dollars per year. These numbers are limited to deployment efforts and do not calculate the economic and social costs and missed benefits of ubiquitous wireless services, including

emergency response services and public safety. Equally important, these numbers are based on pre-*Sprint II* calculations and, in the event *Sprint II* is not overturned, it is almost certain that the number of difficult jurisdictions will increase.

Thus, "[t]he [TCA] itself unquestionably focuses on issues central to the national economy: '[The] Act . . . promotes competition and reduces regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.'" *Petersburg Cellular Pshp. v. Bd. of Supervisors,* 205 F.3d 688, 711 (4th Cir. 2000) (". . . the siting of telecommunications towers substantially affects interstate commerce . . .") (citing H.R. Rep. No. 104-204, at 47 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10).

In *Sprint II,* notwithstanding the widely recognized importance of the TCA on the country's economy and the court's own acknowledgment of the "dramatic" effect of the TCA,[2] the Ninth Circuit selectively focused its attention on the TCA's expressed concerns about monopolies to support a narrow interpretation of § 253. *Sprint II,* 543 F.3d at 575 ("Congress [chose to end the States' longstanding practice of granting and maintaining local exchange monopolies] by enacting 47 U.S.C. § 253, *a new statutory section that preempts state and local regulations that maintain the monopoly*

---

[2] In *Sprint II,* the Ninth Circuit added: "The Act 'represents a dramatic shift in the nature of telecommunications regulation . . .'" 543 F.3d at 576 (citing *Cablevision of Boston, Inc. v. Pub. Improvement Comm'n,* 184 F.3d 88, 97 (1st Cir. 1999)).

status of a telecommunications service provider") (emphasis added). This selective focus ignored the broader purposes of the TCA and § 253's role in accomplishing those purposes.[3]

Rather, there are three separate if interwoven purposes expressly identified in the TCA: (1) promote competition by, *inter alia*, preventing state and local protectionism; (2) facilitate cost containment by reducing regulatory burdens at the state and local level; and (3) encourage the rapid deployment of infrastructure necessary to support new telecommunications technologies.[4] *Auburn*, 260 F.3d at 1170 n.5 ("The full

---

[3] This circumscribed focus is especially noteworthy in light of *Sprint I*, which noted: "Though the act did not 'federalize telecommunications land use law' (citation omitted), *it established meaningful limits beyond which state and local governments may not inhibit telecommunications by preventing the construction of wireless communications facilities.* Accordingly, we determine that local zoning ordinances...are within the preemptive scope of § 253(a) (removing barriers)." *Sprint I*, 490 F.3d at 718 (emphasis added).

[4] *See also* Deonne L. Brunning, "The Telecommunications Act of 1996: The Challenge of Competition," 30 CREIGHTON L. REV. 1255, 1256 (1997) *cited in Puerto Rico Tel. Co. v. Telecomms. Bd.*, 189 F.3d 1, 8 (1st Cir. 1999) ("describing the Act as intended (1) to promote competition and reduce regulation to secure lower prices and higher quality services for American telecommunications consumers, (2) to encourage the rapid deployment of new telecommunications technologies, and (3) to implement policies that will prevent harm to consumers from the implementation of competition"). Even in this characterization, deployment of infrastructure necessary to support new technologies stands as a separate purpose of the TCA.

title of the Act is 'An Act to *promote competition* and *reduce regulation* in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the *rapid deployment* of new telecommunications technologies'") (emphasis added).

The TCA's multidimensional focus is highlighted in its legislative history. "As the legislative history explains, the Act creates a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." *Core Commc'ns, Inc. v. Verizon Pa., Inc.*, 493 F.3d 333, 335 (3rd Cir. 2007) citing *Puerto Rico Tel. Co. v. Telecomms. Regulatory Bd.*, 189 F.3d 1, 7-8 (1st Cir. 1999) (quoting H.R. Conf. Rep. No. 104-458, at 113 (1996) (internal quotes omitted)). By focusing solely on the TCA's concern with locally supported monopolies, the Ninth Circuit could avoid addressing the impact its decision will have on the full range of goals identified by the TCA, specifically, the counterproductive impact its interpretation of § 253 will have on efforts to "reduce regulation" and the devastating impact its interpretation will have on infrastructure deployment efforts. *See, supra,* note 3.

In addition to these stated goals of the TCA, the FCC and this Court have both recognized the unstated but equally important goal of regulatory consistency. *City of Rancho Palos Verdes v. Abrams,* 544 U.S. 113, 127-8, 125 S. Ct. 1453; 161 L. Ed. 2d 316 (2005) ("Context

here, for example, makes clear that Congress saw a national problem, namely, an inconsistent and, at times, conflicting patchwork of state and local siting requirements, which threatened the deployment of a national wireless communication system") (internal quotes and citations omitted). In *TCI*, cited *supra*, the FCC explained its concern as follows:

> "Each local government may believe it is simply protecting the interests of its constituents. The telecommunications interests of constituents, however, are not only local. They are statewide, national and international as well. We believe that Congress' recognition of this fact was the genesis of its grant of preemption authority to this Commission.
>
> "This concern is exacerbated by the potential for multiple, inconsistent obligations imposed on a community-by-community basis. Such a patchwork quilt of differing local regulations may well discourage regional or national strategies by telecommunications providers, and thus adversely affect the economics of their competitive strategies."

TCI, 12 F.C.C.R. at para. 106.

Sprint II abandons this concern with consistency as well because it cannot be reconciled with the Ninth Circuit's revised interpretation of § 253, which effectively rules out preemption of local ordinances unless the ordinance constitutes a blatant, if not express,

attempt to protect an existing monopoly provider by prohibiting new entrants into the market. *Sprint II*, 543 F.3d at 576, 580. *Sprint II*, therefore, encourages localities to select their own unique regulatory apparatus to govern placement of wireless facilities, untouched by the statute's preemptive force. The Ninth Circuit's efforts at unifying its decision in *Sprint II* with its prior ruling on 47 U.S.C. § 332, *MetroPCS, Inc. v. City & County of San Francisco*, 400 F.3d 715 (9th Cir. 2005), bears this out. *Sprint II*, 543 F.3d at 578 (". . . [in MetroPCS] we rejected the plaintiff's argument that, because the city's zoning ordinance granted discretion to the city to reject an application based on vague standards such as necessity, the ordinance necessarily constituted an effective prohibition") (internal quotes omitted). As *Abrams* points out: "Congress ultimately rejected the national approach and substituted a system based on cooperative federalism." *Abrams*, 544 U.S. at 128. But the Court added: "State and local authorities would remain free to make siting decisions. They would do so, however, subject to *minimum federal standards*—both substantive and procedural—as well as federal judicial review." *Id.* (emphasis added). In the absence of an effective mechanism for challenging ordinances that exceed these "minimum federal standards," there can be no expectation of regulatory consistency in the siting of wireless telecommunications facilities.

Moreover, it can readily be seen that *Sprint II* will reverse years of effort at accomplishing these federal goals. The decision is already producing deleterious effects. Several California cities and counties immediately responded to the issuance of *Sprint II* by

initiating or reinstating plans to adopt rigorous zoning ordinances or by abandoning plans to tailor their ordinances in light of *Sprint I* and related litigation.

On January 7, 2009, the City of Glendale adopted a moratorium on the placement of all wireless facilities, including collocations, in all areas of the city zoned residential and in all public rights-of-way. The moratorium was proposed after residents objected to the City's approval of several T-Mobile applications for encroachment permits to place their facilities in public rights-of-way because of concerns about health impacts due to radio frequency emissions. The purpose of the moratorium was to terminate permit approvals until the City adopts a new ordinance governing these placements. In its report to the Council, city staff made the following assertion about the effects of *Sprint II* in that it ". . . create[s] . . . an opportunity to review and analyze existing ordinances and the current state of the law so that . . . the City may safeguard Residential Areas from the intrusion of incompatible and potentially disruptive uses through the development of a new ordinance relating to . . . Wireless Facilities." Report to City Council (City of Glendale) (Jan. 7, 2009), p. 2. The Glendale Report notes that "many cities have become engaged in comprehensive reviews of their zoning and right-of-way ordinances *in order to consider stricter requirements for placements of wireless antennas.*" *Id.* at p. 9 (emphasis added). It then identifies pending or ongoing actions in the cities of Pasadena, Walnut Creek, Burbank, Huntington Beach, Irvine, Los Angeles, Ventura County, San Francisco, San Diego, La Canada-Flintridge, and Orange County. *Id.* at 9-11.

Among the cities identified in the Glendale Report is the City of Irvine, which also recently adopted a moratorium as a result of an injunction issued by district court in *NewPath v. Irvine*, cited *supra*, based largely on *Sprint I*. The purpose of the moratorium was to permit the City sufficient time to revise the Irvine WCO, which was similar to the County WTO, to bring it into conformance with *Sprint I's* interpretation of § 253. The staff report on the moratorium noted that the district judge "did, however, acknowledge that the City retains the right to craft a reasonable discretionary regulatory structure to address the installation and/or augmentation of wireless telecommunications facilities." Request for Council Action (City of Irvine) (September 9, 2008), pp. 2-3. Shortly after the ruling in *Sprint II* was issued, the City determined that it was no longer necessary to "craft a reasonable discretionary regulatory structure" and added the following comment to the home page of its web site: "The United States Court of Appeals for the Ninth Circuit has issued a ruling favorable to the City of Irvine's original wireless ordinance" and added a link to the slip opinion.[5]

The district court that enjoined Los Angeles County's Zoning Ordinance wrote: "The Court has little trouble concluding that this process is so burdensome and Byzantine as to erect a barrier to providing telecommunications services." *NextG Networks of Cal., Inc. v. County of Los Angeles*, 522 F. Supp. 2d 1240, *26 (C.D. Cal. 2007). The County thereafter drafted extensive revisions to its zoning code, adding administrative approvals for certain types of facilities

[5] http://www.cityofirvine.org.

in specified locations, and relocated provisions concerning placement of wireless facilities in the public rights-of-way from the zoning code to the public works code. The revisions were near adoption but, following *Sprint II*, no further action has been taken.

The City and County of San Francisco recently adopted a moratorium on construction of wireless facilities and was involved in extensive revisions to its zoning code which would have included adoption of standards for administrative approval of right-of-way facilities. At a recent meeting with industry, city staff communicated that the Board of Supervisors would not support the proposed standards.

The City of San Diego is presently subject to multiple lawsuits that raise § 253 as a challenge to its wireless telecommunications regulations, policies and guidelines. *See, e.g., American Tower Corp. v. City of San Diego*, Case No. 07cv0399 (S.D. Cal., filed, as amended, August 29, 2007). The City has refused to alter its tremendously difficult permitting requirements and refuses to renew any existing wireless facilities unless those facilities are brought into conformance with its rigorous camouflaging requirements. The City has already stated that it has no concerns regarding cost of compliance and no concern regarding impact to the network. Notwithstanding these onerous conditions, the City refuses to modify its own monopoles and towers, even as it requires removal and replacement of monopoles directly adjacent to its own facilities.

C. The Court Also Should Hear This Case Because It Raises Important Issues of Federalism

The FCC noted the constitutional importance of § 253 when it wrote:

> "Congress sought to strike a balance in the 1996 Act. Obligations were imposed on incumbent carriers to create conditions essential to the development of competition. At the same time, Congress recognized the need for State and local governments to continue respond to truly local issues. *Section 253 plays an important role in this regime.*"

TCI, 12 F.C.C.R. at par. 107 (emphasis added). The Court has identified this "balance" as a form of "cooperative federalism." *Abrams*, 544 U.S. at 128; *Core Commc'ns*, 493 F.3d at 335 ("To achieve these goals, the [TCA] provides that various responsibilities are to be divided between the state and federal governments, making it an exercise in what has been termed cooperative federalism").

Given the important role that § 253 plays in maintaining the TCA's version of "cooperative federalism," any interpretation of § 253 that threatens to undermine that balance should be suspect and should be a compelling reason for certiorari. It is not surprising that the FCC sees § 253's role in this balance of power as important. *TCI*, 12 F.C.C.R. at par. 107. First, § 253 is the backstop to the TCA's main thrusters for promoting competition, §§ 251 and 252. Properly applied, § 253 ensures that competition has sufficient "lift" by

thwarting local efforts to impede competition, and it can do so without the heavy hand of national control. *Abrams*, 544 U.S. at 128. Second, the structure of § 253 is itself evidence of a concern for balance. The anti-prohibition provisions in § 253(a), as they were understood at the FCC and interpreted in *Auburn* and *Sprint I*, form a platform for identifying the "minimum federal standards" that should restrict local authority in support of the TCA's "pro-competitive, deregulatory framework." *Id. Sprint I*, 490 F.3d at 718 ("Though the act did not federalize telecommunications land use law (citation omitted), it established meaningful limits beyond which state and local governments may not inhibit telecommunications by preventing the construction of wireless communications facilities"). Sections 253(b) and 253(c) then describe the authority that is reserved to state and local jurisdictions, respectively, notwithstanding § 253(a). However, if a court is allowed to effectively remove § 253(a) from this equation, as *Sprint II* does by narrowly construing its ability to preempt regulatory overreaching, the balance is undone and cooperative federalism is transformed into a euphemism for local control.

In fact, this Court has expressed serious reservations about the impacts of a misread of § 253(a):

> ". . . the practical implication . . . is to read out of § 253 the words 'or ha[s] the effect of prohibiting,' by which Congress signaled its willingness to preempt laws that produce the unwanted effect, even if they do not advertise their prohibitory agenda on their faces. Even

> if § 253 permitted such a formalistic distinction between implicit and explicit repeals of authority, the result would be incoherence of policy; *whether the issue is viewed through the lens of preventing anticompetitive action or the lens of state autonomy from federal interference, there is no justification for preempting only those laws that self-consciously interfere with the delivery of telecommunications services.* . . . the dissent ends up reading [§ 253(a)] in a way that disregards its plain language and entails a policy consequence that Congress could not possibly have intended."

Nixon v. Mo. Mun. League, 541 U.S. 125, 139-140 (2004) (emphasis added).

D. The Court Needs To Clarify the Application of *United States v. Salerno*

A further reason for granting certiorari is *Sprint II's* confused treatment of the "no set of circumstances" test articulated in *United States v. Salerno*, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (1987). Even though *Sprint II* noted that "[t]he Supreme Court and this court have called into question the continuing validity of the *Salerno* rule," it improperly limited that debate to First Amendment challenges.[6] *Sprint II*, 543

---

[6] Note Justice Scalia's dissent in *City of Chicago v. Morales*, 527 U.S. 41, 77, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999) ("... until recently we have – except in free-speech cases subject to the doctrine of overbreadth – required the facial challenge to be a (Cont'd)

F.3d at 579 n.3. The court held that "[i]n cases involving federal preemption of a local statute . . . the rule applies with full force." *Id.*

However, *Sprint II* failed to fully explore the tension surrounding *Salerno*, which is described in detail in a non-First Amendment case, *Morales*, 527 U.S. at 55 n.2 (plurality opinion) ("To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself").

By its own admission, the court's interpretation of *Salerno* eviscerates the industry's ability to use § 253 to challenge oppressive ordinances that discourage deployment. *Sprint II*, 543 F.3d at 579. Under that interpretation, likelihood of abuse of discretion, with or without supporting evidence, is insufficient to sustain a facial challenge where there is the possibility of a lawful application of the ordinance. *Id.* at 580 (speculating that "it is equally true (and more likely) that a zoning board would exercise its discretion only to balance the

---

(Cont'd)

go-for-broke proposition . . ."). Note also that this case involves the values the First Amendment seeks to promote. This case can be compared to billboard cases in as much as a billboard is analogous to wireless infrastructure. Both types of infrastructure are equally critical to reaching the audience of their customer-speakers. The First Amendment prohibits not only content-based restrictions that censor particular points of view, but also content-neutral restrictions that unduly constrict the opportunities for free expression. *City of Ladue v. Gilleo*, 512 U.S. 43, 55, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994).

competing goals of an ordinance"). The court's views belie the industry's repeated experiences with publicly disfavored cell sites and widespread efforts to use zoning ordinances to discourage deployment. Moreover, in this setting, the distinction between facial and as-applied challenges is misleading.[7] Even if *Salerno* controls, this case also offers the opportunity to recognize the validity of facial challenges when it is clear that there is "no set of circumstances" in which an ordinance is not overly burdensome or does not grant unfettered discretion and, therefore, impairs the public goals which Congress has sought to promote. *Morales*, 527 U.S. at 71 (Breyer, J., concurring) ("The ordinance is unconstitutional, not because a policeman applied this discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion *in every case*").

---

[7] The debate . . . over when litigants should be able to challenge statutes as "facially" invalid, rather than merely invalid "as applied":

> ". . . reflects mistaken assumptions. There is no single distinctive category of facial, as opposed to as-applied, litigation. All challenges to statutes arise when a litigant claims that a statute cannot be enforced against her. . . . Accordingly, debates about the permissibility of facial challenges should be recast as debates about the substantive tests that should be applied to enforce particular . . . provisions."

Richard H. Fallon, Jr., "Commentary: As-Applied and Facial Challenges and Third-Party Standing," 113 HARV. L. REV. 1321, 1321 (2000).

E. *Sprint II* Would Foster Anti-Competitive Actions Contrary to the TCA's Goals

Finally, as described throughout, § 253 must be read in light of the TCA's express focus on stimulating a competitive marketplace. In this vein, the FCC has decided that the proper method of determining whether a regulation "has the effect of prohibiting" telecommunications under Section 253(a) is "whether the [regulation] materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *In re Cal. Payphone Ass'n*, 12 F.C.C.R. 14191, 14206 (1997). As Petitioner notes, "[a]ll of the other courts of appeals [beyond the Ninth Circuit] to have addressed the construction of Section 253(a) have discussed (and to a varying degree relied upon)" this language. Petitioner Br. at 20 n.6.

It thus becomes important to recognize that competition is not only internal to the wireless telecommunications industry, but also external and includes wireline telephone companies, cable companies, electric companies offering broadband over power line services, and even satellite providers. Burdensome regulations applied specifically to one aspect of the broader telecommunications market undoubtedly "materially inhibits [and] limits the ability of" wireless providers to compete against other telecommunications providers "in a fair and balanced regulatory environment." *Cal. Payphone*, cited *supra*.

CONCLUSION

As an FCC report recently noted, "Cell phones rank just behind keys when it comes to items that Americans don't leave home without."[8] Additionally, approximately one out of seven Americans has "cut the cord."[9] For these users, their wireless devices are their only telephones. As wireless usage expands for broadband data and mobile media, carriers will need to develop additional facilities to meet subscriber demand. More importantly, carriers need to be able to provide a strong, high-quality signal in residential areas so that wireless users can be protected in case of an emergency. E911 is a service activated when a wireless caller dials 911, and allows first responders to identify the caller's location. The Ninth Circuit's affirmation of excessive restrictions on wireless infrastructure deployment will thwart technological innovation and the deployment of infrastructure that is necessary to support it.

Amici therefore respectfully request that the Court grant Petitioner's request for a writ of certiorari.

---

[8] *In re:* Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Radio Services, *Twelfth Report*, WT Dkt. No. 07-71, 23 F.C.C.R. 2241 (Feb. 4, 2008) (*quoting* Marguerite Reardon, "Will Unlocked Cellphones Free Consumers?" www.USAToday.com, Jan. 24, 2007).

[9] *See, e.g.*, Stephen J. Blumberg, Ph.D., and Julian V. Luke, "Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January – June 2007" (Division of Health Interview Statistics, National Center for Health Statistics, 2007)

Respectfully submitted,

ROBERT JYSTAD
Counsel of Record
JULIAN K. QUATTLEBAUM, III
MARTHA HUDAK
CHANNEL LAW GROUP, LLP
100 Oceangate, Suite 1400
Long Beach, CA 90802
(310) 209-8515

JACQUELINE MCCARTHY
Director of Government Affairs
MICHAEL D. SAPERSTEIN, JR.
Public Policy Analyst PCIA – The Wireless Infrastructure Association
901 N. Washington St., Suite 600
Alexandria, VA 22314

Counsel for Amici Curiae